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PERSUASION AS A SOCIAL HEURISTIC:
A RHETORICAL ANALYSIS OF THE MAKING OF THE
CONSTITUTION OF NAMIBIA

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At the time of writing, I was the only person known to have been granted unprecedented access to the *Hansard* of the Standing Committee on Standing Rules and Orders and Internal Arrangements. The *Hansard* remains classified to date (see Diescho 1993, Geingob 2004). I am, therefore, thankful to Findley Hacker, Deputy Secretary at the Parliament of the Republic of Namibia and Kosie Pretorius, Chairman of the Monitor Action Group, for providing me the *Hansard* that served as the primary source of this thesis. Pretorius also welcomed me to his home when I needed to clarify my thoughts. I take a jibe at him below, which is poor reward for his ongoing hospitality to me. I am also thankful to Maria Shaanika, Martha Kapeng and Melitta Kgobetsi for typing most of the papers.

I must thank the Right Honourable Dr. Hage Geingob, the first Prime Minister of Namibia (for whom I worked as spokesman) for his inspiration. Despite having received numerous honorary doctorates from many universities around the world, Dr. Geingob refused to use the honorific title of “Doctor” until he earned one in his own name at the

age of 64 from Leeds University. Geingob was also the chairman of the Windhoek Constituent Assembly that drafted the constitution for Namibia. His chairmanship of the assembly is a true example of classic leadership. Then, there are the members of the Constituent Assembly themselves. As this thesis makes clear, a constituent assembly is a body elected with the purpose of drafting, and in some cases, adopting a constitution. But it will hardly escape anyone's attention that I have something to write about only because our founding fathers and mothers drafted a constitution. In the absence of a spirited debate and expansive deliberation, there would be no thesis on rhetoric of constitution-making in Namibia. Whatever the faults and shortcomings of our constitution, it is clear to me that Namibia is what she is because of those deliberations. In this, the debt I owe the framers of our constitution is a debt owed them by all Namibians who care about the great civil society conversations that define what is best in our democracy.

This study is intended as both an introduction and a modest contribution to the body of literature on rhetoric. It will be of value, I hope, to the growing number of students, researchers and citizens with a keen interest in the subject. My own interest in rhetoric derives from many years working as a television director, speechwriter and communication practitioner in different sectors where I closely observed how rhetoric was (and continue to be) used and abused. During this time, it has become clear that what rhetoric does is as much a product of external factors as with a deliberate effort by those attempting to persuade.

I wish my Mum was still alive to see me finish this doctoral thesis. I thank her for having loved me unreservedly. My Dad's life-long teachings have come to bear. My siblings have always had more faith in me than I did in myself. Their wisdom, understanding and support they offered throughout this process is immeasurable. I extend to each of them my fullest respect and appreciation. I receive this degree of Doctor of Philosophy on all their behalf.

DEDICATION

To the most important woman in my life: Kimberly, my eleven-year old daughter, who never asked why, but, instead gave freely of her love. She has been and continue to be a constant source of inspiration and support and are proof that with love, all things are possible...even a PhD in rhetoric. The long nights have come to an end...I hope.

I love you.

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ABSTRACT

The study focuses on the rhetoric used during the drafting of the Constitution of the Republic of Namibia. The thesis will offer a framework for understanding negotiations in terms of distinct and coherent rhetoric.

Primary sources for this thesis consist of five volumes of the *Hansard* of the Standing Committee on Standing Rules and Orders and Internal Arrangements of the Windhoek Constituent Assembly. To understand the rhetoric under which the Namibian Constitution was drafted, the *Hansard* of the Standing Committee was analysed. By analysing the *Hansard*, one can begin to formulate a picture of the rhetoric that led to a new Constitution of the Republic of Namibia and begin to understand rhetoric in the Namibian context.

In order to make valid assertions, one has to go beyond what was said in the Constituent Assembly and look at what the participants said elsewhere. The thesis is concerned here with their words, not with their thoughts. But there is a recognition that sometimes thoughts matter as much as words. No judgements are made on the merits of their arguments. The study simply intended to examine their rhetoric and how rhetoric impacted on the final outcome of the negotiations.

The study revealed that, with very few exceptions, most of the debates of the Windhoek Constituent Assembly were initially built on argument and many of them were solved through practical reasoning. This can be explained in part by the attitude of the members and in part by the constraint of the process.

The study also revealed that the informative role of deliberation helped the framers of the Namibian constitution to form a more complete set of preferences than they originally had or even forced them to change positions when they were exposed to the full consequences or incoherence of their original proposals. For another, when political actors needed to justify their proposals, they found that impartial arguments were not available or, if they were, they were too obviously tied to a particular interest to be convincing.

The appeal to fear strategy, as a means to enable delegates to better recognise the nature of the problems facing the political community and to begin thinking about potential solutions, was clearly at play at the Windhoek Constituent Assembly.

Finally, the proceedings of the Windhoek Constituent Assembly which framed the Constitution show that many of the provisions of that instrument which are seemingly straightforward and artless rest in reality upon compromises, and are often laboured and tortuous. The outcome of constitution-making in Namibia was greatly influenced by the exchange of arguments and counter-arguments among the framers.

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KEY WORDS

Rhetoric, persuasion, negotiation, argument, compromise, bargaining, distributive bargaining, Constitution of Namibia, constituent assembly, SWAPO

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DECLARATION

I declare that **Persuasion as a Social Heuristic: A Rhetorical Analysis of the making of the Constitution of Namibia** is my own work, that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Audrin Mathe

LIST OF ABBREVIATIONS

ACN	ACTION CHRISTIAN NATIONAL
AG	ADMINISTRATOR GENERAL
CA	CONSTITUENT ASSEMBLY
CDA	CRITICAL DISCOURSE ANALYSIS
DTA	DEMOCRATIC TURNHALLE ALLIANCE
FCN	FEDERAL CONVENTION OF NAMIBIA
NNF	NAMIBIA NATIONAL FRONT
NPF	NAMIBIA PATRIOTIC FRONT
PR	PROPORTIONAL REPRESENTATION
SWAPO	SOUTH WEST AFRICA PEOPLE'S ORGANISATION
UDF	UNITED DEMOCRATIC FRONT
UN	UNITED NATIONS
UNSC	UNITED NATIONS SECURITY COUNCIL
US	UNITED STATES

PREFACE

I am intrigued by the question how speakers in legislatures win the approval and attention of fellow members through persuasive language. This was how the idea of writing something on the making of the Namibian Constitution was born. When I began researching this thesis, it never occurred to me that I collected enough materials on the *Hansard* of the Standing Committee on Standing Rules and Orders and Internal Arrangements than I had initially thought.

This thesis is quite voluminous: being the actual research study itself and four appendices. Appendices includes:

- a) The Principles concerning the Constituent Assembly and the Constitution for an Independent Namibia;
- b) List of the names of Members of the Standing Committee on Standing Rules and Orders and Internal Arrangements;
- c) The Constitution of the Republic of Namibia and
- d) Excerpts from the *Hansard* of the Windhoek Constituent Assembly's Standing Committee on Standing Rules and Orders and Internal Arrangements.

I wanted the readers of this thesis to get a glimpse of the nature of the debates as I saw them. Some sections in the thesis, specifically verbatim quotes attributed to others, contain grammatical errors. I have taken no effort to correct the record with respect to those as they are the exact utterances as reproduced from the *Hansard*. I hope that this arrangement will help the reader understand this study better.

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Principles concerning the Constituent Assembly and the Constitution for an Independent Namibia

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INTRODUCTION

Mankind have a great aversion to intellectual labour; but even supposing knowledge to be easily attainable, more people would be content to be ignorant than would take even a little trouble to acquire it.

Samuel Johnson, 1709 - 1784

Background of study

Namibia has a long history of colonial rule. After 75 years of South African colonial and later military occupation, Namibia, a former German colony (1884-1915), attained its independence on 21 March 1990 (Diescho 1993: 8). The period since the Second World War has been marked, among other things, by a proliferation of formally negotiated constitutions, beginning with the nations rebuilding after the war, continuing through the period of independence from colonial rule and through the periods of democratisation, culminating in the establishment of new regimes after the collapse of communism (Covell 2003). Such nations include Namibia.

The road to independence was long and bitter, culminating in 23 years of armed struggle. The guerrilla war for independence escalated sharply as South African government troops began raiding guerrilla bases in Angola, while the South West African People's Organisation (SWAPO) forces hit back in Namibia. In 1976, the United Nations (UN) condemned South Africa for illegal occupation of the territory. In 1977, the UN General Assembly recognised SWAPO as the sole legitimate representative of Namibia. In 1978, the UN called an international conference to resolve the conflict. South Africa's Prime Minister John Vorster agreed to free elections to be supervised by the UN to determine the fate of Namibia. He then reneged. In 1979, Vorster, now president, again rejected a UN proposal to settle the dispute. Two years later a peace conference in Geneva also failed to win concessions from the South African government. Control of Walvis Bay, Namibia's only deep-water port, was a major point of contention. The United States (U.S.) supported South Africa's refusal to withdraw from Namibia unless Cuban troops pulled out of Angola. A commission was set up to monitor a cease-fire agreement in 1984. In order to appease the international community, a multiracial government was

installed in Namibia by South Africa in 1985, but SWAPO's armed struggle continued because of lack of progress toward implementing UN Resolution 435 on independence for Namibia and the withdrawal of Cuban troops from Angola. The centrepiece of Resolution 435 was a plan drafted by five Western countries, namely the U.S, Canada, Britain, France and West Germany after consultations with the South African government. This plan called for the withdrawal of all South African soldiers from Namibia within a period of seven months and for an UN-supervised election of a Constituent Assembly which was to draft an independence constitution. Other elements in the plan included a ceasefire between South African and SWAPO soldiers in Namibia, the repeal of racially discriminatory and repressive South African laws in the territory, freedom of speech and assembly, the return home of Namibians living in exile and the release of all political prisoners and detainees. In December 1988, a U.S-mediated peace agreement linked the UN Resolution 435 was signed by South Africa, Cuba and Angola, setting a timetable for Namibian independence. At the same time, Cuba and Angola agreed to a phased withdrawal of Cuban troops from Angola. The agreement established basic guidelines within which the country's political leaders can determine the exact nature of the constitution and decide on the democratic institutions to be established (Diescho 1993). In addition, the spirit of the pact carried over to the drafting of the constitution during the many sessions of the Constituent Assembly. The United Nations Transition Assistance Group (UNTAG) began operations in April 1989. After a disastrous start in which South African forces massacred PLAN forces seeking to report to UNTAG to be confined to designated areas, UNTAG slowly gained control over the registration and electoral process in most areas. The 1989 election held under the auspices of the UN, gave SWAPO 57 percent of the vote and 60 percent of the seats in the constituent assembly (the constituent assembly later became the first national assembly). SWAPO suggested that the Assembly adopt the 1982 Constitutional Principles as the starting point for discussion. This created a favourable climate for working together. As Geingob (2004) observes, "The committee's work was made easier still as a result of a suggestion from Mr. Dirk Mudge of DTA. He recognized that SWAPO was in the majority, and suggested that SWAPO's draft constitution be adopted as a working draft, and discussions could take place around it on issues where different drafts were at variance with it" (126). With two-thirds majorities needed to draft and adopt a constitution, some measure of reconciliation was necessary to avoid deadlock. In

fact, SWAPO and the business community wanted a climate of national reconciliation in order to achieve a relatively peaceful initial independence period. As a result, a constitution emphasizing human, civil and property rights was adopted unanimously on 9 February 1990 and reconciliation became the dominant mood.

As Forrest (1998) notes, during those sessions, SWAPO and the opposition parties perceived that the forces pulling them together toward democratic constitutionalism were greater than the centrifugal forces which often tear apart racially or ethnically divided societies. A spirit of accommodation prevailed that reflected the participants' determination to create a workable system of government in which all participants had a stake in the system's success.

The Windhoek Constituent Assembly was particularly important in that not only was it concerned with determining the truth or falsity of events that took place in the past, but was also concerned with determining whether or not particular actions should or should not be taken in the future as it was concerned with how values were going to be dealt with in the present given the divergent views of the political parties at the time. Thus, as Geingob 2004 notes, events leading to the framing of Namibia's constitution had many variables, often conflicting, with different interests and parties trying to influence the clauses in the constitution that rule the machinery of government, the assignment of rights and the procedures for amending the constitution.

A 72-member Constituent Assembly, consisting of members of several political parties, drafted a Constitution for the Republic of Namibia following elections held on a proportional basis. The actual drafting of the principles were done by the Standing Committee on Standing Rules and Orders and Internal Arrangements representing all the parties in the constituent assembly and delegated the task of perfecting it to a team of South African legal experts: Arthur Chaskalson; Marinus Wiechers and Gerhard Erasmus. The three legal experts were invited to sit in the Constituent Assembly and Standing Committee meetings to get a feel of the political context of the discussions. They did not, however, participate in any discussions unless specific questions were directed to them. The report of the standing committee was then tabled to the whole Constituent Assembly for debate. On 9 February 1990, the Constitution of Namibia was adopted without anyone opposing it. The constitution has been hailed as the most democratic in the history of Africa south of the Sahara (Cottrell 1991). "In many ways, the contents of the Namibian

Constitution reflect the uniquely international character of the role of law, and organisations and decisions in the process that led to independence in a far more significant way than in any other state in the world...(This) was the result of a political compromise between, on the one hand, the seven political parties that gained seats in the Constituent Assembly, and between South Africa, the United Nations and the South West People's Organisation (SWAPO), on the other. That means that the outcome of the constitutional process is unlike what any of the participants wanted or anticipated. It is the result of a "serious effort of debate and a give-and-take process whereby all the participants, as duly elected representatives of all the Namibian people, ended up with a document of which only they, and no one else, were the architects" (Diescho 1993: 8-9).

Sam Nujoma, the long time leader of SWAPO, became president. For the new government, the costs of reconciliation included retaining about 15,000 unneeded white civil servants, deferring the landownership and mineral-company terms issues and offering de facto amnesty for all pre-independence acts of violence - including those of SWAPO against suspected spies and dissidents in Angola in the late 1980s.

Every constitution combines into one body a declaration of political intent, a commitment to an ideology and an assertion of national purpose combined with a blueprint for political action expressed in legal terms. As such it reflects, in a capsule form, the national elite's view of the nation and the world. Like all national documents written by mere human beings, every constitution may be expected to contain a dose of erroneous interpretation of past experiences and of existing national and international realities.

However much extra-political forces may influence particular constitution-making situations or constitutional acts, ultimately both involve directly political expressions, involvements and choices. In that sense, the dynamics of constitution-making have to do with questions of constitutional choice. Drafting a constitution is a complex, often controversial and highly consequential political process. Charged with drafting a constitution, constitutional assemblies or conventions follow a set of rules to reach agreement over controversial issues. For example, the drafting committee agreed that decision making should be "talk-centric" rather than "voting-centric". That is, outcomes should be determined by reasons rather than numbers. Such bodies resemble parliaments in terms of their institutional arrangements.

While legislative drafting has been the subject of a considerable literature, the drafting of constitutions or constitutional provisions has received little attention. It is often assumed that the drafting of constitutional provisions does not differ appreciably from legislative drafting. Although this assumption may be correct in many respects, the drafting of constitutional provisions presents a number of special problems, both substantive and formal, which require the application of some specialised techniques in their solution (Grad 1967). It is not the province of this study to enumerate what those problems are or how to resolve them. That is a study for future scholarship.

Like the American debates, the Namibian Standing Committee took place behind closed doors and the proceedings were kept secret. The secrecy could be kept because the group of delegates was small at only 21 members and the Assembly itself lasted for only 80 days. On the other hand, the French debates were intensely public; there were more than a thousand delegates and the proceedings stretched out for more than two years.

Research questions

In the past, the Constitution has been studied mainly by students of constitutional and political history, of government and of law. They have been, naturally, interested primarily in such matters as the structure and powers of the government, checks and balances, separation of powers, guarantees of fundamental rights and freedoms and kindred subjects. This is new and it is different.

My research focuses on the rhetoric used during the drafting of the Constitution of the Republic of Namibia from November 1989 until January 1990. I will offer a framework for understanding negotiations in terms of several distinct and coherent rhetoric or sets of speech acts: Firstly, what reasons, grounds, justifications or explanations either in support of, or in opposition to, some claim or position were provided? The reasons invoked may be factual, logical or normative. Secondly, what tools of rhetorical construction of distributive bargaining were applied during the negotiations for Namibia's Constitution? With this question, I examine how conflicts were dealt with through the distribution of a number of non-controversial issues to resolve a conflict in favour of one party at the expense of the other. Thirdly, how did the rhetorical creation of common ground influence the outcome of negotiations for Namibia's Constitution? Here, I investigate how highly controversial issues were

resolved in favour of both parties. Finally, what compromises did the parties make during the constitution-making process? Here, I investigate how specific agreements were reached through classical exchanges of concessions.

Significance of the study

Literature on the drafting of the Constitution of Namibia is thin, mainly because the framers thought it best to keep the discussions of the Constituent Assembly secret. There is not, to my knowledge, a single book or even an article that considers the rhetorical process of constitution-making on Namibia in its full generality, as a distinctive object of rhetoric analysis. I recognise that an enlarged concept of rhetoric is necessary if we are to comprehend the substantial and dynamic senses in which rhetoric functions to generate continuous validation of ways in which the Namibian community act together. This study is the first serious attempt to understand the process by analysing the actual rhetoric used by the participants. For that reason alone, the study is significant.

A study of the proceedings of the Windhoek Constituent Assembly, which framed the Constitution, shows that many of the provisions of that instrument which are seemingly straightforward and artless rest in reality upon compromises, often laboured and tortuous. The drafting of the Namibian Constitution was a process of give and take involving a number of actors from across the political divide. Political leaders' rhetorics are important instances of public argumentation. During the recent past, members of the public have begun to call for the amendment of the constitution to re-introduce death penalty. While the constitution limits the term of office of the state president, in 1997 the constitution was amended to introduce a third-term for the first state president. These debates raised concern among certain sectors of the Namibian society. It is nearly impossible to understand the present debates about the Constitution if one does not understand the historical developments leading to the current discussions and problems. Such knowledge is useful not only for its practical benefits, but also because it forms a critical and analytical foundation for approaching many of the tasks that face people daily as they construct and respond to the discourse that shapes their experience of the world. As such, they merit scholarly attention.

Negotiation is a dialogue intended to resolve disputes, to produce an agreement upon courses of action, to bargain for individual or collective advantage

or to craft outcomes to satisfy various interests. This study will help provide insight into problem-solving and decision-making as well as conflict management and resolution in any given situation.

Limitations of the study

A major limitation of this work has been the absence of audio recordings of the proceedings of the Standing Committee on Standing rules and Orders and Internal Arrangements. The research primarily relied on the *Hansard*. Thus, it was not entirely possible to discern the exact meaning of certain concepts used by some members of the drafting committee.

Another limitation was that sometimes, titles of the delegates were wrong. For example, the *Hansard* identified a Mrs. Amathila and a Dr. Amathila, while in fact referring to Mr. Amathila. It is true that there was a Dr. Amathila or Mrs. Amathila, but not one who was a member of the committee. These shortcomings were corrected by verifying the actual identities of the members of the Standing Committee on Standing rules and Orders and Internal Arrangements against every volume of the *Hansard*. However, these limitations do not in any way limit the value of the research.

Literature survey

As stated elsewhere, it is hard to find literature on Namibian rhetoric. Two decades after its adoption, the Constitution of Namibia was an enigma to investigators largely because they had little source material - the government having refused to release the records of the standing committee. At the time of researching this work, I am the only known person to have been granted access to those materials by the speaker of the national assembly. Consequently, prior writers confronting the constitution were obliged to skip over it in a paragraph or sentence. I nonetheless found the following publications very useful: Kosie Pretorius' "Parliamentary potholes"; Hage Geingob's *"State Formation in Namibia: Promoting Democracy and Good Governance"*; Joseph Diescho's *"The Namibian constitution in perspective"*; Jill Cottrell's *"The Constitution of Namibia: An Overview"*; Henry J. Richardson's *"Constitutive Questions in the Negotiations for Namibian Independence"*; Sam Brooke's *"Constitution-making and immutable principles"* and Marinus Wiechers' (1) *"Namibia: The 1982 Constitutional Principles and Their Legal*

Significance” and (2) “*Constitution-Making, Peace-Building, and National Reconciliation: Namibia*”.

The University of Cape Town Libraries contains useful materials that I found very enriching. I read various publications including “Rhetoric and Public Affairs”, “The Quarterly Journal of Speech”, “Political Communication”, “Journal of Communication”, “Rhetorica”, “Philosophy and Rhetoric”, “Southern Communication Journal”, “Rhetoric Society Quarterly”, “Public Opinion Quarterly”, “Legislative Studies Quarterly” and “Rhetoric Review”.

Elsewhere, a limited pool of authors has written extensively on constitution-making. I am inspired by Jon Elster’s comparative writings on the nature of the debates that took place in the Federal Convention in Philadelphia in 1787 and the Assemblée Constituante in Paris (Elster 1991). Elster argues that parties to an argument engage in sincere exchange of impartial reasons and valid principles with the aim of persuading one another (*ibid.*).

I benefited enormously from the insightful work of Roger Fisher, William L. Ury and Bruce Patton (1991) on negotiations. They ask the question: Is the deal on the table better than what you would get by walking away? Their special contribution applies academic theory from a range of disciplines to real-world problems.

But it is John W. Sewell and I. William Zartman (1984) who argues that no party negotiates unless the costs of not negotiating are higher than those of negotiating. Sewell and Zartman (1984) argue that negotiating does not necessarily mean that all parties want to reach an agreement either. Indeed, some parties participate simply to be able to stall any agreement. They argue that issues are negotiable only if one rejects the idea of the total conversion of one party to the views of the other. The issue therefore becomes how much change has to be made in the positions of both sides in order to get the parties to negotiate. They contend that there is a need to formulate the possibilities of a favourable outcome and to change the perception of non-negotiability. After all, negotiations are essentially reflections or ratifications of shifts in power between two parties (*ibid.*).

Methodology

Primary sources for this dissertation consist of five volumes of the *Hansard* of the Standing Committee on Standing Rules and Orders and Internal Arrangements

of the Windhoek Constituent Assembly. The *Hansard* remains confidential but I was been given unprecedented access for this thesis.

To understand the rhetoric under which the Namibian Constitution was negotiated and drafted, I analysed the *Hansard* of the Standing Committee on Standing Rules and Orders and Internal Arrangements for the period 8, 11 - 15 and 18 - 19 December 1989 to 10, 15, 17 and 19 January 1990. The Standing Committee on Standing Rules and Orders and Internal Arrangements was responsible for drafting the Constitution for consideration by the constituent assembly. By analysing the *Hansard* of the Standing Committee, one can begin to formulate a picture of the rhetoric that led to a Constitution of the Republic of Namibia and begin to understand rhetoric in the Namibian context. For example, the discussion among the Windhoek Assembly delegates on whether or not Namibia should adopt a presidential system (like the U.S) as opposed to a parliamentary system (as found in Europe) revealed deep-rooted emotions during the drafting of Namibia's Constitution. Some delegates used threats to push through their points of view. Others threatened to "go public" on the deliberations of the Drafting Committee. Emotional flooding poses obvious hazards to negotiators who need to be able to think clearly when faced with the complex, strategically demanding task of creating and claiming value. While compromise is commonplace among politicians representing organised interest groups, the fact that many politically-affected people are not party to these compromises means that political compromises are selective. It follows, then, that the public interest is anything and everything that can be secured by the mediation of conflicting claims for power. Compromise not only is a worthy, self-sufficient political ideal but the distinguishing and essential characteristic of democracy as a form of government. At the Windhoek Assembly, delegates, in some cases, abandoned their own positions in favour of those proposed by their opponents or merged the proposal of the opponents with their own. For example, SWAPO originally wanted an executive president, while the opposition parties wanted a ceremonial president with a an executive prime minister. In the end, the parties agreed to create two offices: an executive president and a prime minister with powers written in the constitution. These social interactions way at play during the drafting of the Namibian constitution.

For this study, I considered constitutional issues from a socio-political perspective after many years of strictly juridical approaches. This approach permits a

fruitful study of the constitutional processes and specifically provides a better insight into its connection to the process of rhetoric analysis *vis-à-vis* democratic consolidation. The thesis, thus, has a significant interdisciplinary inclination drawing on the literatures of communication, political science and history. But its orientation is rhetorical. As stated elsewhere, the overriding purpose of this investigation is to explain how rhetoric is created in the interrelationships between the various utterances and their contexts of bargaining at the Windhoek Assembly. The rhetorical perspective not only directs the attention of the investigation, but also expresses the understanding of social reality.

However anachronistic as it may seem, I closely make reference to the debates that took place at the Federal Convention at Philadelphia in 1787 and at the *Assemblée Constituante* in Paris 1789-91. Most of the African countries' constitutions were drafted outside the countries and by people comprising the citizens and representatives of the colonizing states. In Namibia, on the other hand, the constitution was drafted by Namibians in Namibia (Geingob 2004). Namibia thus stands out to be a case study comparable to France and the US for nations that drafted their own constitutions. Furthermore, the Federal Convention at Philadelphia and the *Assemblée Constituante* at Paris are significant because they took place at about the same time; had many intellectual ancestors in common and the orators used many of the same historical precedents in arguing for or against various institutional arrangements. More importantly, several of the issues on the agenda were similar to those argued at the Windhoek assembly – namely, bicameralism, executive and elections.

In this thesis, I examine only those areas that constituted material or areas of dispute – where parties had different positions from each other. Areas of a general agreement – where there were no disagreements are excluded. In order to make informed analysis, however, I go beyond what was said in the Constituent Assembly and look at what the participants said elsewhere. I do not make judgements as to who made better arguments or had good proposals. I simply examine their arguments from a rhetorical perspective and how rhetoric impacted on the final outcome of the negotiations. I am concerned here with their words, not with their thoughts although I do recognise that sometimes thoughts matter as much as words.

Theoretical framework

I will also use a multi-disciplinary brand of critical discourse analysis (CDA) that tries to triangulate social issues in terms of a combined study of discursive, cognitive and social dimensions of a problem (van Dijk 1993). Thus, in this case, I am interested not just in describing some interesting properties of rhetoric, but in order to explain them I need to relate them to such socio-cognitive representations as attitudes, norms, values and ideologies as well as to the socio-political context of the debate. What is most important to understand about rhetoric, however, is that it is not only a method for training effective rhetors as a discipline for advanced study. It is also a method for understanding on a theoretical as well as a practical level how humans use language to alter or shape our understanding of reality. It is this latter use that is often used in describing critical discourse analysis.

Expressed in today's vocabulary, critical discourse analysis is nothing more than a deconstructive reading and interpretation of a problem. CDA will, thus, not provide absolute answers to a specific problem, but enable us to understand the conditions behind a specific problem and make us realise that the essence of that problem and its resolution lie in its assumptions - the very assumptions that enable the existence of that problem.

Definitions

In this thesis, I use certain key concepts in order to explain certain ideas. I use the word *rhetoric* with its classic meaning to describe the art of persuasive communication. By *negotiation* I mean any situation or process in which two or more parties to some possible consensual agreement seek to reach that agreement without the aid or intervention of an authoritative third party (Wetlaufer. 2005). An *argument* is a piece of discourse or writing in which someone tries to convince others (or himself) of the truth of a claim by citing reasons on its behalf (Govier 1987). *Politics* simply means an area of study concerned with developing a knowledge and understanding of government and society.

Constitution is the fundamental law of a nation or state which establishes the character and basic principles of a government. I use *Republic* to mean a political system in which the supreme power lies in a body of citizens who can elect people to represent them.

Thesis outline

In this Introduction, I provided the background of the study, established the research problem, sketched the significance of the study, provided an overview of a description of the content analytic method used to conduct the study and created the theoretical framework. I also provided conceptual definitions of the key variables of this study.

The progression of chapters is deliberate: each chapter identifies a clear analytical perspective that is explored in the thesis. In Chapter 1, I will analyse the arguments, reasons and explanations offered by one party in favour of or against a particular position. The chapter investigates how negotiations require a bridge in order to overcome disagreements. In Chapter 2, I will provide a discussion on the rhetorical construction of distributive bargaining as arising from the research question. Specifically, I will discuss various characteristics including threats and use of pressure tactics in bargaining. The chapter moves from a general discussion of rhetorical argument to an analytical investigation of the nature of rhetorical bargaining. Chapter 3 will provide a discussion on the rhetorical creation of common ground by specifically looking at what the participants of the constituent assembly agreed on as constitutional matters which were of common interest. This chapter navigates rhetoric of compromise in relation to the interests of parties to a negotiation. In Chapter 4, I will discuss rhetoric with specific reference to how parties voluntarily submitted to the demands of the other party or passively acquiesced to the other as a way of compromise. This chapter examines how finding common ground is necessary in creating goodwill among negotiators in order to achieve desired outcomes. I will conclude the study by providing a summary.

CHAPTER ONE

BARGAINING

I am a very poor guy. I own basically nothing on this world. But the one thing I have which has never been for sale, which never will be for sale, is my integrity and I take strong exception to some of the things that have been said by some of the honourable members about our performance when briefing these lawyers.

Vekuii Rukoro, 1989

Introduction

The primary objective of this chapter is to suggest that argument might have been one of the registers through which negotiations at the Windhoek Assembly were conducted. Constitution-making and constitutional choices are vital aspects of democratic government: they are more than the arid preparation of constitutional documents. Rather, constitution-making involves the embodiment of the constitutional traditions of the body politic in appropriate binding rules of the game that properly reflect the polity model basis and socio-economic distribution of power. Negotiations can be understood in the full treatment of argument, which is described here as a coherent set of speech acts and conventions concerning their use. Argument is distinctive, at least in degree, from the other rhetorical regimes of argumentation such as deliberation, epideictic and forensic that might be brought to bear in the course of a negotiation.

Let it suffice for now that constitutional choice involves utilising appropriate models that recognise the importance of institutions in the lives of humans, the significance of history and culture in shaping those institutions and rendering particular institutions effective or ineffective and identifying the empirical and behavioural dimensions of the constitutional process in each case. It is here that rhetoric comes into play. Argument, then, is a process that deals with beliefs and opinions (Van Eemeren and Grootendorst 1996). But whatever the scope of argument may be, significant effort has gone into identifying principles or norms that can be used to evaluate arguments (Van Eemeren and Grootendorst 1996). Such principles or norms can be used to call into question either action by individuals that constitute part of the process of argument or outcomes of the process, the conclusions that it leads to. While *negotiation* may sometimes be distinguished from *bargaining*, it is not uncommon for those terms to be used interchangeably (Lewicki

et al. 1994) and bargaining certainly tends to involve threats, deception and other sorts of tactics that would normally be excluded by principles of argumentation (Schelling 1980). These were not uncommon at the Windhoek Assembly.

The association of argument with rational discussion is a well-established one. In the context on the Namibian constitution-making process, argument shall mean “that element in our expressions which carries the power to convince people in rational discussion” (Naess 1966: 97). Sycara (1990: 203) claims that “persuasive argumentation lies at the heart of negotiation and embodies the dynamics of negotiation.” There seems to be some tension between the uncritical inter-mixture of argument and negotiation, on the one hand, and Elster’s emphatic distinction, on the other. Different approaches may arise because different authors focus on different aspects of bargaining and negotiation. Thus, for example, in establishing a formal model of argumentation-based reasoning and negotiation, Parsons *et al.* have their agents make proposals about agreements and trade-offs that are reminiscent of ideas emphasised in Fisher and Ury’s popular negotiation handbook *Getting to Yes*, ideas such as “focus on interests, not positions”. This approach to bargaining, sometimes referred to as “mutual gains bargaining”, revisits earlier ideas of “integrative negotiation” (Walton and McKersie 1991). But it is doubtful whether all bargaining is or can become “mutual-gains bargaining” (Schelling 1980). There remain some bargaining episodes that verge on “limited war” (Aristotle 1960).

Britton *et al.* characterise persuasive discourse as part of the transactional use of language that attempts to overcome potential resistance or opposition in order to effect some change in action, behaviour, attitude and belief through reason, argument and strategy (Rojot 1991). Elsewhere, they argue that the persuasive use of language amounts to a “deliberate assault,” be it recognisable or disguised, “on other people’s behaviour or attitudes or opinions” (Britton 1975: 98). Their characterisation clearly assumes that opposition or confrontation constitutes the basis or provides the motivation for persuasive discourse. It sees persuasive discourse as a necessary means of resolving or neutralising the perceived opposition or conflict and of bringing about “a change of heart” in audience.

Emotions in negotiations

The success of the persuasive efforts depends on the emotional dispositions of the audience. For people do not judge in the same way when they grieve and

rejoice or when they are friendly and hostile. Thus, the orator has to arouse emotions exactly because emotions have the power to modify human judgments. To a judge who is in a friendly mood, the person about whom he is going to judge seems not to do wrong or only in a small way. But to the judge who is in an angry mood, the same person will seem to do the opposite (Aristotle 1991). Many interpreters writing on the rhetorical emotions were misled by the role of the emotions in Aristotle's ethics. They suggested that the orator has to arouse the emotions in order to motivate the audience or to make them better persons (Aristotle 1991).

That said, the art of negotiation lies in discerning and working out differences between the parties. At times the differences may provoke substantial conflict, leading to emotional outbursts and heated discussions. Some people find exhilaration in the adrenaline rush that occurs during such moments, but an equal or greater number react to conflict by dreading and avoiding it. These varying reactions suggest that emotions function both in positive and negative ways. Emotions differ from *moods* in that they are discrete (Russell and Feldman Barrett 1999), of relatively high intensity and short duration and intentional, that is, directed at an object, person or event.

Prior research has mostly focused on the *intrapersonal* effects of affect in negotiation, that is, the influence of a negotiator's emotional state on his behaviour. For example, positive affect has been shown to increase concession making (Baron 1990), stimulate creative problem solving (Isen *et al.* 1987), increase joint gains (Allred *et al.* 1997), increase preferences for cooperation (Baron *et al.* 1990), reduce the use of contentious tactics (Carnevale and Isen 1986) and increase the use of cooperative negotiation strategies (Forgas 1998). Conversely, negative affect has been shown to decrease initial offers (Baron *et al.* 1990), decrease joint gains (Allred *et al.* 1997), promote the rejection of ultimatum offers (Pillutla and Murnighan 1996), increase the use of competitive strategies (Forgas 1998) and decrease the desire to work together in the future (Allred *et al.* 1997).

There is evidence that the manifestation of social interplay were largely present at the Windhoek Assembly. On the first day of substantive negotiations between the various parties at the Namibian Constituent Assembly on 8 December November 1989, suspicions ran high after a blistering campaign. Internal parties and SWAPO knew little about each and were suspicious of each other's real intentions. It did not take long to test these suspicions. In late 1989, the Administrator General

(AG) of the territory, Louis Pienaar had plans to privatise certain schools for the exclusive use of whites. Members of the Constituent Assembly (CA) reacted angrily and demanded an audience with him. The CA sent a bi-partisan delegation that included Aksie Christelike Nasionale (ACN) member, Kosie Pretorius. Following that meeting, a newspaper report alleged that: a) all the committee members, with the exception of Pretorius, expressed their unequivocal opposition to the move; b) when the committee met in the Tintenpalast, Pretorius told his fellow committee member that he was only going along to gather information and not to question the merits of the issue and c) that Pretorius repeated this when they met Pienaar in South West house and d) that at the conclusion of the meeting with the AG, Pretorius was requested to remain behind. Pretorius objected to the report and that someone within the committee had deliberately leaked the information to the newspaper. But he did confirm that the secretary of the administrator general called him back to sign for a parcel and that AG “then spoke a few words to me.”¹

The seriousness of the allegations had the potential to derail negotiations. Mudge, a white member of rival main opposition Democratic Turnhalle Alliance (DTA) party, held the view that discussing a newspaper report was a waste of time.² This was clearly a diversion from the issues raised by Pretorius. *Diversion* techniques distract focus or divert attention away from key issues, usually by intensifying unrelated issues or trivial factors. Mudge’s response falls in this category. He argued that he thought there was “a large part of the white community who cannot support this move and they are waiting for direction from my side and from others”.³ It was clear that he wanted to distance himself from any actions that would spoil the spirit of the negotiations for a new constitution. But more importantly, he wanted to disassociate himself from Pretorius:

...I don’t want to start a quarrel with Mr. Pretorius here, but as somebody who represents a large percentage of the white people; this whole thing was kept a secret. I was at no stage informed, consulted or in any way approached. I am hearing rumours, I had to rely on rumours, but the way this thing was done, makes it impossible for me to serve in a committee with Mr. Pretorius because we are going to clash on this issue now. There is no doubt about that. I am

¹ Windhoek Constituent Assembly, *Hansard of the Standing Committee on Standing Rules and Orders and Internal Arrangements*, 8 December 1989.

² *Ibid.*, 8 December 1989.

³ *Ibid.*, 8 December 1989.

going to have a problem with the church to which I belong, because even the way the church allowed themselves to be dragged into this thing, as a member of the Reformed Church I am not aware of any discussions. I, as a member of the Church, was never consulted. So, all I want to ask is, when we approach the AG, Mr. Pretorius must not insist on the right to be part of the delegation. He must not use us to make things easier for him now.⁴

In the *Rhetoric*, Aristotle tries to explicate the causes of anger, the state of mind of those who become angry, and those at whom people become angry. Emotions like anger are important to Aristotle's theory of rhetoric, although it is important to understand that there is a distinction between the emotional state of anger and angry rhetoric. Angry rhetoric, regardless of how it is performed publicly, tries to evoke anger in one's audience, as Aristotle himself demonstrates. Once evoked, anger has enormous implications, significantly altering both the spatial and temporal framework in which audiences see the world. Aristotle recognised that the pleasure of anger derives from the way people imagine how in the future their anger can be appeased. "A kind of pleasure follows from [dwelling on anger] and also because people dwell in their minds on retaliating; then the image [*phantasia*] that occurs creates pleasure" (1387b2). Emotions must not be discarded by logicians as inherently fallacious. However, it must also be used cautiously by rhetoricians in order to secure influence over an audience without infringing upon the veracity of one's assertions. Unfortunately, Aristotle offers little obvious advice in the *Rhetoric* about when it is *morally* advisable to employ angry rhetoric in public discourse, although he does suggest practical ways for a speaker to "put his hearers . . . into the right frame of mind" with regard to certain issues and the speaker's persuasive intent (1378a15–16). For Aristotle, the problem of angry rhetoric seems closely connected to ethos or the character of the speaker. However, once again he offers little specific advice about the role anger might play in constituting the ethos of the orator.

During negotiations, where one negotiator believes that the other side cannot be trusted or tries to overreach, he or she may experience frustration or anger. In these instances, emotions can get out of hand and thwart agreement. Pretorius' conservative views did not serve him well during the drafting of Namibia's constitution. In the discussion of the draft proposal on a bill of human rights,

⁴ *Ibid.*, 8 December 1989.

Pretorius was in favour of a clause that allowed discrimination of the admission of pupils or recruitment of staff based on race, colour or creed. He believed very strongly that the principle clashed with the United Nations Declaration on the “Elimination of all forms of Intolerance and Discrimination based on Religion or Belief which will make it impossible for religious private schools not to discriminate on that basis.”⁵ This view was strongly opposed by Barney Barnes, a coloured or “mixed race” member of the DTA party because “the purpose of drafting the constitution was precisely to eliminate discrimination. I would like us to avoid opening the perpetuation of the status quo or repeat history.”⁶ Given the deep-seated feelings prevailing among the majority of people – having just come out of a repressive apartheid rule, Pretorius should have foreseen that his comments would bring to light attitudes which the Namibian people have waged an armed struggle for.

Pretorius insisted that “according to this United Nations document there must be freedom to religion, belief and worship and teaching, the right to train and appoint leaders.”⁷ This statement seemed to confirm suspicion among some delegates – especially SWAPO members - that Pretorius was determined to perpetuate discrimination. This is clear from the remarks of Dr. Ngarikutuke Tjiriange who gently reminded the assembly members that Namibia was emerging from the nightmare of apartheid and it was therefore necessary to close “all the loopholes that can be used to bring about that nightmare again...There is only one church that has been notorious and it is the Dutch Reformed Church, when it comes to the black people...”⁸ His use of the metaphor “nightmare” to describe past atrocities committed against the people of Namibia is striking. The most widely held view of the semantic status of metaphors is that they are a substitute for literal meaning. The very idea that some statements are metaphor seems to imply that there is always a literal meaning from which the metaphorical meaning is a departure and to which it could, ideally, be reduced again.

Bitzer quite accurately reflected that the presence of rhetorical discourse indicates the presence of a rhetorical situation. While the existence of a rhetorical address is a reliable sign of the existence of situation, it does not follow that a situation exists only when the discourse exists. He argued that one can probably

⁵ *Ibid.*, 8 December 1989.

⁶ *Ibid.*, 8 December 1989.

⁷ *Ibid.*, 8 December 1989.

⁸ *Ibid.*, 8 December 1989.

recall a specific time and place when there was opportunity to speak on some urgent matter, and after the opportunity was gone he created in private thought the speech he should have uttered earlier in the situation (Bitzer 1968). Bitzer defines rhetorical situation as a “complex of persons, events, objects and relations presenting an actual or potential exigency which can be completely or partially removed if discourse, introduced into the situation, can so constrain human decision or action as to bring about the significant modification of the exigency” (1968: 2). An exigency which can be modified only by means other than discourse is not rhetorical. Thus, an exigency is not rhetorical when its modification requires merely one's own action or the application of a tool, but neither requires nor invites the assistance of discourse. An exigency is rhetorical when it is capable of positive modification and when positive modification requires discourse or can be assisted by discourse. In any rhetorical situation there will be at least one controlling exigency which functions as the organising principle: it specifies the audience to be addressed and the change to be effected. As Bitzer argues, the exigency may or may not be perceived clearly by the rhetor or other persons in the situation; it may be strong or weak depending upon the clarity of their perception and the degree of their interest in it (Bitzer, *ibid*). When it is perceived and when it is strong and important, then it constrains the thought and action of the perceiver who may respond rhetorically if he is in a position to do so.

Under these circumstances, Pretorius lost a window of opportunity to correct a perception that might have been created by his statements. Instead, he was consistent that he had “very much respect and understanding for the honourable member’s emotional approach of this question, but again I want to refer it to the committee, that it is a point of difference...”⁹ To the relief of many at the assembly, Mudge believed that “this is another way of keeping schools racially segregated. And please, Sir, I am Afrikaans-speaking white, you must have no doubt about that, I want my language to be protected....but not this way.”¹⁰ As Aristotle would say, Mudge had considered the rhetorical situation with his treatment of the argument.

Research generally has supported the proposition that source credibility is a very important element in the communication process, whether the goal of the communication effort is that of persuasion or the generation of understanding (Andersen and Clevenger 1963). That said, conventional wisdom suggests that

⁹ *Ibid.*, 8 December 1989.

¹⁰ *Ibid.*, 8 December 1989.

anger have no place in negotiations. Anger, according to Aristotle, is a man's longing for revenge when someone appears to slight him and when the slight appears undeserved. In order to arouse anger, the rhetorician must present this treatment as outrageous, appealing to his hearer's sense of his own worth, which has been violated. His rhetoric must show the respect that the man who slighted failed to show (Nichols 1987). It was unavoidable for anger to occur at Windhoek Assembly. Pendukeni Ithana, the only female member of the drafting committee, was not convinced by the arguments presented by Moses Katjiuongua of the National Patriotic Front (NPF) on the need of the second house because "the arguments given are *flimsy* (emphasis added). I don't know if we are here to create bodies representing minorities. We should move away from bantustanisation or tribal authorities."¹¹ This statement by Mrs. Ithana was set to anger Moses Katjiuongua. Opposition parties resented any reference to their association with the apartheid government of South Africa which has supported them against SWAPO in much the same way that SWAPO resented being called a terrorist organisation. It is worth noting that Katjiuongua was a minister in the South African-created government of national unity which ruled Namibia for four years until the period before the independence elections in 1989. Angry rhetoric, then, is designed in one fashion or another to make an audience angry (or angrier) and to have them direct this anger toward a particular agent, policy or idea. When a speaker faces an audience that ought to be angry the doctrine of justified anger would suggest that the speaker ought to use angry rhetoric.

Barbara Gray advises that negotiators need to be able to stay centred in circumstances where emotions are likely to rise and respond effectively to the emotional outbursts while also not losing sight of the substance of the negotiation (2003). Katjiuongua's reaction to Ithana was precisely the situation that Gray had described. It is worth quoting him at length:

If I can't convince somebody, I simply can't convince. There is nothing more I can do about that. So, I don't want to go into the merits or demerits of what has been said here, what is flimsy, what is tribal and so on. If I use the same language, I don't know where we are going to end up. If you think that my arguments are flimsy and yours are better, then there is no point in continuing

¹¹ *Ibid.*, 19 December 1989.

talking about this thing here... Then I think we stop the whole discussion about this issue and go back to the Assembly and the Assembly will have a look into that, those discussion points, and the public and everybody and then we will get a feedback what other people than ourselves think about these things. I think the position is very clear. The only portion I agree with my dear sister here is that we are here, the so-called minority parties, you either say you accept the inclusion of a second chamber or you say no and then we know where we stand with you. I don't think we should dilly-dally on that issue. With all due respect, I don't think I am here to accept something in principle that may or may not be included in a future constitution. We are here to have a second chamber included in the constitution. My experience, my training and so on is just beyond some of the arguments that are being put on the table here and I can't argue in the manner which is argued here - Bantustans, homelands and all these. I can use the same tribal language that is being used indirectly against me. I can say worse things, and with all due respect to the chairman, I don't want allow myself to be provoked, because I can use similar language. I don't think it will get this house anywhere. I think people discuss in a civilised manner, they disagree, they agree to disagree. I don't think there is a mid-way about that.¹²

The speaker arousing anger must also claim that an injury has been done that calls for redress. Indeed, if the insult and revenge consume the angry man, the one who insulted remains in control. It is hard to tell whether Katjiuongua's initial remarks were so provocative to warrant Ithana's response to the extent that anger was aroused. In this context, Katjiuongua's anger appeared to jeopardise the ongoing negotiations. Because of this danger, there is a certain moral ambiguity in anger and revenge. Aristotle does recommend calming anger by such means as showing that no slight has occurred, that the slight was not done willingly or that the person who slighted is grieved for what he has done. In these cases, he assumes that there are circumstances in which anger and revenge are the appropriate reactions, while he shows that such circumstances do not exist in the case at hand. Katjiuongua did not live up to Aristotle's expectations. While he did not "want allow myself to be provoked because I can use similar language", he nonetheless let it known that he was angry.

¹² *Ibid.*, 19 December 1989.

To his credit, Katjuongua remained focused on his argument – that of establishing a second chamber of parliament.

Much of the history of constitutional negotiations at the Windhoek Assembly can be described in terms of mistrust and a lack of understanding by each side with respect to the political needs of the other. Trust is a key underpinning of successful negotiations (Putnam 1994). If negotiators cannot trust each other, then every issue requires verification and each agreement necessitates iron-clad guarantees. Anger, expressed inappropriately, can destroy trust. This was true at the Windhoek Assembly when Hartmut Ruppel of SWAPO dictated corrections to one of the constitutional principles which he said he had discussed with senior members of the SWAPO caucus, Mudge of DTA and Rukoro of the Namibia National Front (NNF) who all allegedly agreed that the details in the instructions were correct. The document dealt with the establishment of the second house. It later transpired that some members of the drafting committee were not consulted. Among those not consulted was Moses Katjuongua of the Namibia Patriotic Front (NPF) who said the document was not a reflection of what was discussed and approved. Therefore he had no understanding that a correction of that report was dictated to include the views of members outside the meeting. He said it was a total anomaly for a document to be discussed outside the “meeting by the senior members of SWAPO and allegedly with Mr. Mudge and also Mr. Rukoro...”¹³ Rhetoric, however, is not just the art of persuading people of whatever comes into one's mind but also the art of conveying a truth which cannot be stated literally. There was no denying of what Katjuongua regarded as “total anomaly” on the part of Ruppel's conduct. Rukoro weighed in that indeed Ruppel had consulted him but while they were on the aeroplane.

He did tell me that he drafted that particular paragraph after consultations with senior members of the SWAPO-caucus and with Mr. Mudge and that he cleared it with both camps...¹⁴

Rukoro said he had read the document and felt it was a fair reflection of the discussion that took place at the assembly. Mudge also confirmed Ruppel's phone call but said he did not agree with the draft that was read to him. He had told Ruppel

¹³ *Ibid.*, 15 January 1990.

¹⁴ *Ibid.*, 15 January 1990.

that “I am not the boss around here...”¹⁵ The suggestion that Ruppel deliberately conspired with or intended to sneak behind other members to include a new constitutional principle seems implausible and Katjiuongua’s willingness to advance it seems to indicate that he was given to the sorts of misrepresentation and distortion typical of politicians. By Ruppel’s own account, it was just a formulation which he had asked some members of the assembly to provide.

I just want to record that I take an extremely dim view of what has been said about the way I was operating. I did what I did in good faith and in order to bring forward the proceedings of the committee. I did not consult anyone outside, I did report myself.¹⁶

He wanted to compare notes which he had after the last meeting of this house, he said. As Ruppel implored his audience to look at the motive of his actions, the truths of his arguments were not threatened by emotions. The response of Barnes suggests, however, that the larger audience is not a universally coherent group. Barnes said he had made it “very clear to this meeting that Mr. Mudge is part of the delegation of the DTA. That does not put Mr. Mudge in any particular special category that he should be consulted and the rest of our delegation should not be consulted”.¹⁷ He thought “we were past the stage where, with due respect, ethnicity plays a role in discussions”.¹⁸ He said the incident had “also caused an unnecessary wastage of precious time this morning by Mr. Ruppel taking the dim view on the reaction of my honourable colleague and member of this Constitutional Committee, Mr. Mudge”.¹⁹ He equally took a “dim view on the introduction of things by people on their own, trying to influence or slip things in. This leaves a great question mark on our honesty and ability to act in good faith”.²⁰ He believed that “this is an act of bad faith. I will accommodate you by not speaking further on this matter and trust that this will not occur again that members in their individual capacity decide to draft their own constitutions. I thank you.”²¹

¹⁵ *Ibid.*, 15 January 1990.

¹⁶ *Ibid.*, 15 January 1990.

¹⁷ *Ibid.*, 15 January 1990.

¹⁸ *Ibid.*, 15 January 1990.

¹⁹ *Ibid.*, 15 January 1990.

²⁰ *Ibid.*, 15 January 1990.

²¹ *Ibid.*, 15 January 1990.

The chairman, Hage Geingob, sensed that the discussions were getting too emotional. He wanted to put on record that Ruppel should be recognised for having worked hard. Geingob said he also

...want to be clear...the poor man was asked to go and brief these lawyers...I think he was decent enough to try to call people to talk to them. We are not being fair in not realising the nature of our instructions to this gentleman²².

Rukoro requested that a day be set aside in order to discuss serious accusations that have been made on his and Ruppel's professional integrity. He said he was a very poor guy.

I own basically nothing on this world. But the one thing I have which has never been for sale, which never will be for sale, is my integrity and I take strong exception to some of the things that have been said by some of the honourable members about our performance when briefing these lawyers.²³

There is no doubt that the charge of unprofessional conduct against Ruppel was, rhetorically, designed to meet Katjuongua's political needs. Although the *ad hominem*, questioning of an arguer's position by citing a presumptive inconsistency within that position (Walton 1992), has a reputation for being fallacious and nothing more than an attack on one's character, it should be considered relevant and important criticism in a critical discussion. According to Walton, this importance is primarily derived from the personalisation which occurs when an *ad hominem* is used because it concentrates its attack on the character of one's opponent. But rather than considering this personalisation as a negative aspect of discussion, Walton goes so far as to say that this is the most important single benefit of a successful critical discussion (*ibid*).

The debate about rights and responsibilities was one of those debates which were racially-charged. Pretorius of ACN wanted to know why there was no provision "that with every right there is a corresponding responsibility."²⁴ Katjuongua of NPF responded that he had heard of these arguments from Pretorius

...about four years ago – he is very consistent - sometimes I got the impression...that somehow he implied that blacks only want rights but didn't

²² *Ibid.*, 15 January 1990

²³ *Ibid.*, 15 January 1990.

²⁴ *Ibid.*, 15 January 1990.

want the responsibilities, so they must be told that if they want rights, there are corresponding responsibilities...²⁵

Katjiuongua's confidence in the power of veracity was based, at least in part, on the supposition that, as a matter of common sense, persons generally take the effort to speak clearly and distinctly as a reliable gauge of a speaker's effort to state the truth. The process of constitution-making is greatly influenced by the vision and self-interest of various interest groups, parties and individuals participating in the process. Pretorius' arguments were consistent with his organisation's interests. But the frustration exhibited by the chairman of the Constituent Assembly, Hage Geingob, exposed the bare feelings of the majority of the members of the assembly when he admitted that the points raised by Pretorius were emotional for most Namibians. He said "we are operating in a spirit of co-operation, brotherhood and also in a spirit of reconciliation...We will come to know one another and trust is developed, so that the fears of the unknown are also being removed."²⁶ Within all types of political system - from autocratic through oligarchic to democratic - leaders rely on the spoken word to convince others of the benefits that arise from their leadership. The more democratic societies become, the greater the onus on leaders to convince potential followers that they and their policies can be trusted. Geingob suggested that perhaps Pretorius should be afforded an opportunity to consult with his members "not that we are going to go back to apartheid. That is out. But allow him the chance to...explain to the others..."²⁷ At this point, Geingob must have felt that there was nothing remaining to be proved. He wished simply to sum up and to make that summation part of the public record of the assembly. Both here nor in the speeches which directly preceded and followed did he trouble himself with dark language or counterfeit modesty. Pretorius never raised the matter again.

Like at Philadelphia, the nature of the presidency has been a highly contested issue at the Windhoek Assembly. There was general agreement between the framers of the Constitution at Windhoek that executive power should not be unchecked. There were, however, differing views on how these powers could be subjected to oversight. DTA members concentrated on arguing that Namibia should have a ceremonial presidency as opposed to the executive presidency which

²⁵ *Ibid.*, 15 January 1990.

²⁶ *Ibid.*, 15 January 1990.

²⁷ *Ibid.*, 8 December 1989.

SWAPO wanted. Delegates were faced with two options: electing a president directly – thereby giving the office holder to account to the electorate or a president elected by the national assembly accountable to it. SWAPO delegates were unwavering in their demands for a president elected directly by the people. The frustration by the Chairman, Hage Geingob, summed up the mood of all delegates:

Yes, the chair, of course, is punished not to say what he wants to say...I remember that there was some kind of compromise reached to make us move on when the parties had set positions. One wanted an executive presidency, others wanted this...We were trying to hammer that out to come to conclusions...compromise. I am also reminded of what the Western countries do at Security Council level. When Africans will come with a very, very strong draft...then they will give them the impression that if we have to amend this, then we will be in a position to support this, and after the...third World countries had done that, they still come and veto. That is the impression I get here, but I hope I am wrong.²⁸

Later, Hage Geingob put the question again for delegates to pronounce themselves whether “the president is going to be elected direct or indirectly. That is your decision to make.”²⁹ The goodwill generated over three months was now in jeopardy with the response by Barnes that “we are not participating because we made our stand clear on the proposal of the election of the president.”³⁰ The response from Hidipo Hamutenya of SWAPO was straight forward,

...with all respect to Honourable Barnes, to say that you are not participating because your proposal was not taken is out of order. We are going to come to the second house. Suppose we do not want to participate because we did not want it?³¹

Nonetheless, in the spirit of give and take, SWAPO agreed to the provision of a two-term presidency but remained unconvinced by the reasoning given to justify it. SWAPO members felt that limiting the terms was unnecessary and undesirable. First, dictating that a person cannot contest elections for the third term, and dictating that the citizens cannot vote for that person was tantamount to abridging the person’s and voters’ natural rights. Many of them also felt that elections themselves

²⁸ *Ibid.*, 19 January 1990.

²⁹ *Ibid.*, 19 January 1990.

³⁰ *Ibid.*, 19 January 1990.

³¹ *Ibid.*, 19 January 1990.

provided term limits. If citizens did not wish a person to continue in office, they could vote him/her out. Further, limiting terms denied the country access to an experienced office holder. Diffusion of the executive power of the president as a result of his/her sharing executive power with the cabinet, and limit on the number of terms the president can serve, helped alleviate the concerns of the opposition parties. Time will tell if such an arrangement is successful in protecting Namibia from the possibility of any dictatorial tendencies (Geingob 2004: 129-130).

An understanding of the political expectations that each side brought with it to the negotiations may have helped to trace the sources of the political differences that have characterised much of the process by following the logic that lay behind the strategies adopted by the parties. In turn, parties might have suggested an alternative mode of thought that may have revealed the reality of the negotiating process in a way that reduced the gap in the parties' mutual expectations that derived from differing perceptions.

Using threats in negotiations

The *argumentum ad baculum* is defined by Walton as an “appeal to threat of force or to fear...in a critical discussion” (Walton 1992). Walton spends considerable time discussing this definition and whether or not an *ad baculum* argument must include a threat or if fear alone can define the *ad baculum*. Let it suffice for now that arguments may be merely a statement of reasons fully stated or resting on grounds that are merely implied. They include the arguments we might “make” as well as those others we might “have” (O’Keefe 1977) excluding only those quarrels (Walton and Krabbe 1995) and other forms of verbal aggressiveness (Infante and Rancer 1996) that do not involve the giving of reasons. A party might offer arguments relevant to the consequences of a failure to reach agreement, including arguments that might bear upon the seriousness of some warning or the credibility of some threat. When one threatens to fight if attacked, the threat is no more than a communication of one's own incentives, designed to impress on the other the automatic consequences of his act. Whether the delegates at the Windhoek Assembly appreciated this is hard to tell. Incidentally, if threats succeed in deterring, they benefit both parties. But more than communication is involved when one threatens an act that he would have no incentive to perform but that is designed to deter through its promise of mutual harm. This situation presented itself at the

Windhoek Assembly when Hartmut Ruppel suggested there may have been some un-readiness to move positions “that if it was clear that there is no chance of reconciliation of different viewpoints, then that should be formulated and that should go back to the Assembly to be voted on.”³² The extent to which argument could be applied was limited in that persuasion is itself limited. Another mode of reaching decision is through voting. SWAPO obviously had the numerical strength to call a question to a vote. The threat of a vote was used several times during the negotiations.

As negotiations were stalling, SWAPO delegate Nico Bessinger reminded the committee of the opening remarks which were made in the Constituent Assembly by a member of the ACN in his maiden address in which the member said that “they (whites) have accepted that the South West Africa that they have known shall never be.”³³ Bessinger said the majority party felt that at least rigidity had been removed and flexibility installed. He asked to be understanding so that SWAPO would need not to use its numerical strength in order to have its will prevail. Bessinger made an appeal: “I will appeal to ACN to stick to that beautiful speech that they have opened the Constituent Assembly with.”³⁴ Rhetorical perspective takes into consideration that not all decision-making can be based on rational weighing and debating. There must be some space for emotional politics - a demonstration of emotionality by the speaker that enables the audience to imagine certain feelings, attitudes and evaluations (Aristotle 1991 and Covino and Joliffe 1995). Whether or not Bessinger succeeded in appealing to the values described by Aristotle and others, his was a master piece of rhetorical act.

Bargaining can only occur when at least one party takes initiative in proposing a bargain. A deterrent to initiative is the information it yields or may seem to yield, about one's eagerness. As mentioned earlier, one of the sticking points at the Windhoek Assembly was whether Namibia should adopt an executive presidency or a parliamentary head of state with an executive prime minister. SWAPO was strong on the executive presidency with a prime minister and the minority parties favoured a parliamentary head of state. Difference between the two preferences is significant: The semi-presidential system is a system of government in which a prime minister

³² *Ibid.*, 8 December 1989.

³³ *Ibid.*, 8 December 1989.

³⁴ *Ibid.*, 8 December 1989.

and a president are both active participants in the day-to-day administration of the state. It differs from a parliamentary republic in that it has a popularly elected Head of State who is more than a purely ceremonial figurehead. It differs from the semi-presidential system in that the cabinet, although named by the president, is responsible to the legislature, which may force the cabinet to resign through a motion of no confidence. How the powers are divided between president and prime minister can vary greatly between countries.

It was evident that each party was not willing to move from their positions. Barnes of the DTA was firm on his party's stance

...that although the terminology 'ceremonial president' is used, we feel that the president must have certain powers. But we feel for our particular new start in sovereign independence, the fears, the uncertainties, that all those things can be accommodated in an executive prime minister with his cabinet. The fact remains, Sir, that on this point, we are not in dispute with each other.³⁵

He argued that perhaps it would be favourable to consider an exercise to first contribute to national reconciliation and nation-building that could benefit the entire independence process in sovereign independence.

Barnes summed up that SWAPO's bottom line is an executive president, "no matter what, the discussions should evolve around that situation. We have a problem that we cannot perhaps find a solution, and think this is where my honourable colleague, Mr. Mudge, made mention of how much give and take there is on both sides."³⁶ As Jowett and O'Donnell put it "People are reluctant to change; thus, in order to convince them to do so, the persuader has to relate change to something in which the persuadee already believes" (Jowett and O'Donnell 1992: 22-23). The DTA had already mentioned the fact that the party was "not firm on the concept of ceremonial president, we are not firm on the title and we feel that certain powers should be given to the president."³⁷ What we stood for prior to the election result is already a small step in the spirit of give and take, he argued. Although it can never be known exactly what was on Barnes' mind at the time of his intervention, on balance the best guess is that the opposition parties feared the person who was

³⁵ *Ibid.*, 8 December 1989.

³⁶ *Ibid.*, 8 December 1989.

³⁷ *Ibid.*, 8 December 1989.

going to be president not the institution itself. This is coupled with a failure to persuade the majority of negotiators of the proposed point of view.

Aristotle (1991) reminds us that persuasion is accomplished by character whenever the speech is held in such a way as to render the speaker worthy of credence. If the speaker appears to be credible, the audience will form the second order judgment that propositions put forward by the credible speaker are true or acceptable. But how does the speaker manage to appear as a credible person? He must display practical intelligence (*phronêsis*), a virtuous character and goodwill (Aristotle 1991). For, if he displayed none of them, the audience would doubt that he is able to give good advices at all. If he displays all of them, Aristotle concludes, it cannot rationally be doubted that his suggestions are credible. It must be stressed that the speaker must accomplish these effects by *what* he says. It is not necessary that he is actually virtuous. On the contrary, a pre-existing good character cannot be part of the technical means of persuasion.

The work of the standing committee had been facilitated by three legal experts. However, political parties were free to seek legal advice outside the committee at their own expense. In a dramatic turn of events - two days before the conclusion of the negotiations of the constitution - Kosie Pretorius asked if his legal advisors could sit in during the discussions in order "to save time."³⁸ Pretorius was supported by Barney Barnes of the DTA who argued that

...it could be to the advantage of us finishing this constitution possibly much faster than what we are doing now. There is the problem that delegations, after they have deliberated here for the day, have to go back to their legal advisors, discuss the whole process, even at times when we have to make a concession or something that we did not have the time to review. Your legal advisor, within striking distance, is not participating in any of the deliberations, it is only observer status he has and it is my considered opinion that it could be an advantage to speed up matters...³⁹

This proposal was shot down by Hartmut Ruppel of SWAPO who argued that legal advisors would "just delay the discussions"⁴⁰ as preparations between the parties and their legal advisors should have been concluded before the meeting. His view

³⁸ *Ibid.*, 18 January 1990.

³⁹ *Ibid.*, 18 January 1990.

⁴⁰ *Ibid.*, 18 January 1990.

was shared by Nahas Angula who reminded the committee that it was the parties that agreed on the “three legal advisors whose advice would be neutral and should be taken in good faith...”⁴¹ He said political leaders should have political courage and will to make decisions on issues of a problematic nature. The matter was settled by Pretorius who said he didn’t “want the house to be divided, so if there is no consensus I withdraw my request.”⁴²

Rhetoric of bargaining

In the conduct of negotiations, argument may be brought to bear on a variety of different subjects. The parties may offer arguments, reasons or explanations related to the value of whatever is the subject of the negotiation and of possible exchange. In persuasion, the active role of the sender is characterised by deliberate intentions: persuasion does not occur by chance, but because of the sender’s purposes. Jamieson (1985: 394) argues that “intention is a kind of focussing device in the imaginative consciousness; it concentrates and thus it excludes; it is a selective device, selecting an image to be raised into consciousness from a range of alternatives. Without intention, nothing has prominence, therefore one has to intend when one imagines”.

At the Windhoek Assembly, no one had predicted that the negotiations were going to be easy, if anything but that. As stated elsewhere above, the discussion on the powers of the president constituted an area of material dispute. The distance between SWAPO and the minority parties was vast. Clearly so, each side was going to put arguments that affirmed their positions. Mudge of the DTA did not hide his party’s “fears and reservations about an executive president.”⁴³ He was especially worried about the powers of the president in relation to the powers of the prime minister. Mudge did not doubt SWAPO’s right to appoint a president, a prime minister and ministers, but, he said he was concerned that cabinet did not have powers because he “got the impression that they are just there to advise the president. We are used to a system of government where the ministers have power, where the prime minister has an important role to play...”⁴⁴ The truth is that there was never a prime minister in Namibia let alone a government for and by the people

⁴¹ *Ibid.*, 18 January 1990.

⁴² *Ibid.*, 18 January 1990.

⁴³ *Ibid.*, 8 December 1989.

⁴⁴ *Ibid.*, 8 December 1989.

of Namibia. Walton is therefore correct when he suggests that rhetoric can be used correctly or incorrectly to present a particular argument.

While he was aware of the fallacies in Mudge's argument, Theo-Ben Gurirab chose not to address them but instead argued that SWAPO saw the president of the Republic as a father-figure and as a symbol of the authority of the nation. He dismissed the idea of an executive prime minister. He insisted SWAPO's demand for a "prime minister who would be appointed by the president, but who would administer the government affairs."⁴⁵ This view was supported by Hidipo Hamutenya who proposed to further curb the powers of the president in relation to the judiciary and the legislature which had the power to remove the president from office if the president abuses his or her powers and responsibilities. Hamutenya strengthened his argument by referring to the American system which has the "most effective checks and balances..."⁴⁶

Mudge argued that the checks and balances should be brought into the system of government at the level of the executive, the legislative and judiciary where the separation of power should be. Mudge's views are informed by his experiences of how power is wielded in most of Africa particularly his private meetings

...with members from the Zambian...and other governments...that ministers in many of those countries have the feeling that they are sort of just there - they are just glorified members of parliament...we feel checks and balances can only really work when all the power is not concentrated in the hand of one person.⁴⁷

He was hopeful "it is just a matter of finding a solution to a problem which has been worrying us for a long time, the fear for dictatorship, the fear for concentrating power in the hands of one person...that we might end up with an undemocratic society..."⁴⁸

Mudge's remarks should be seen in the context of Munz's argument that people can be persuaded of the truth of a statement when there is reasonable or rational grounds for the statement. In that case no further persuasion over and above the evidence or the rationality of the argument itself is required. When it cannot be shown to be true and even when it is believed to be false, nevertheless people can

⁴⁵ *Ibid.*, 8 December 1989.

⁴⁶ *Ibid.*, 8 December 1989.

⁴⁷ *Ibid.*, 8 December 1989.

⁴⁸ *Ibid.*, 8 December 1989.

be persuaded to give their assent by the employment of rhetoric (Munz 1990). There is no evidence at least from what Mudge said of the experiences in Zambia and other African countries. If anything, his fears affirmed what black people suspected all along that whites were not trustful of a black government. But the repeated appeal to fear by Mudge is cause for reasonable suspicion of the truthfulness of his argument. As Walton suggests, the *ad baculum* may be used as “scaremongering” (1992).

People respond more effectively to messages that explain proposed actions with reference to familiar experiences. Successful politicians are those who can develop their arguments with evidence taken from beliefs about the world around them. Hage Geingob cited the president of the United States of America as one such powerful person with a less powerful cabinet but with a strong congress with checks and balances. The citation is described by Brinton “as a form of ithotic argument [which] involves the direct or indirect quotation of a source with the intention that identification of the opinion or attitude expressed with the source will influence hearers or readers toward acceptance” (1986: 245 - 258). He tried to reassure the minority parties that SWAPO’s proposal was consistent with international practices that what SWAPO promised was not something out of the norm.

SWAPO delegates knew what was at stake. They went out of their way to induce a sense of unity that would bring together former enemies to own the creation of a new nation. Central to classical rhetoric were the notions of ethos, logos and pathos. Aristotle argued that in addition to taking a stance that was morally worthy (ethos) and proofs to support argument (logos) the successful rhetorician should also be able to arouse the feelings (pathos). This could be done both through considering fundamental human experiences and arguments that appeal to the feelings. This is evident from Mose Tjitendero’s reflection of the just ended November 1989 election that the victory was for the birth of democracy and that Namibia was beginning to mark a turning point in the politics of southern Africa and the world. He said one of the things that

we will be proud of as founding fathers and mothers is that we are saying the term of office of the president would not be the conventional terms where the

person serves until he or she dies because tenure of office have been limited to a two five-year term.⁴⁹

The ability to articulate a compelling vision of a bright future is the *sine qua non* of charisma and greatness, two key outcomes for leaders. Though descriptions of charisma abound, there is consensus that charismatic leaders inspire followers "to perform above and beyond the call of duty" (House *et al.* 1991: 364 - 396) by appealing to their emotions and enduring motives rather than by controlling their access to material rewards and resources. Tjitendero's remarks should be understood in this context.

Political leaders become persuasive when their statements interact with other linguistic features to argue for policies. Leaders make statements that will represent their own policies in a positive light and or will disparage those of opponents. Chilton (2004) says the purpose of political discourse involves, among other things, the promotion of representations, and a pervasive feature of representation is the evident need for political speakers to imbue their utterances with evidence, authority and truth, a process that we shall refer to in broad terms, in the context of political discourse, as "legitimation". Political speakers have to guard against the operation of their audience's 'cheater detectors' and provide guarantees for the truth of their sayings.

As the Constituent Assembly turned its attention to working out details about the nature of the legislature, some of the concerns of the members of the assembly were to bring about accountability and establish a system of checks and balances. However, at the same time, one could see that the reasoning behind non-SWAPO parties arguing for a bicameral parliament was informed not just by their desire to enhance accountability. They believed that under proportional representation, with the whole of Namibia as one constituency, SWAPO would continue to secure a majority in the National Assembly for years to come. Keeping Chilton in mind, Katjiuongua argued that the second chamber of parliament should not have the same method of election as national assembly and the country should be divided into provinces or regions organised in such a way that they are inter-racial and inter-tribal. Each province or region will be represented by one or two elected senators. His idea was that the second chamber would be the "custodian of particular values,

⁴⁹ *Ibid.*, 8 December 1989.

concerns and realities and also the body that moderates against monocracy.”⁵⁰ He also wanted the chamber to have, for example, in one house

...a preponderance of one party majority forever or for a very long time, that is the type of monocracy I am referring to, whatever type of form it might take, then you may have by definition the other body which will moderate that monotony and try to introduce another faction in the constitutional life of the nation, the decision-making process.⁵¹

He pleaded strongly that the house, “through my chairman, should consider seriously the necessity for us to begin with this...”⁵² If Emrich *et al.* (2001) suggest that leaders who infuse their messages with image-based words will evoke a stronger emotional response among followers, increasing followers' willingness to embrace their visions and ultimately, to act, then Katjiuongua failed in his motivation for a bicameral parliament. However articulate Katjiuongua was; his rhetoric was uninspiring by all accounts.

Katjiuongua raised the proposal of a bi-cameral parliament at least twice after the proposal failed the first time. He was asked by the assembly to come up with a rationale. The parties to a negotiation may offer arguments concerning the appropriateness of various points at which agreement could ultimately be reached, including such positions as mid-points and difference-splitting, round numbers, objective criteria and neutral principles. Katjiuongua's reasons and justification for the rationale for a second chamber deserve a closer reading. He argued that on a national level, Namibia needs national integration through institutions, thereby creating participation and liberating the people from fear or sectional loyalties. He saw the second house as a platform of discussion by the minority who might not necessarily be elected by numbers. Katjiuongua inevitably hoped to persuade. Typically, he wanted to convince others why a second chamber was necessary. While the success of his claims depended, in part, on the constellation of interests and resources held by various constituencies in the process, the way claims were articulated also affected whether he persuaded and moved the audiences to which he were addressed. Claims-making, then, is a rhetorical activity. But also, parties to a negotiation can misrepresent facts for self-serving purposes. Such

⁵⁰ *Ibid.*, 18 December 1989.

⁵¹ *Ibid.*, 18 December 1989.

⁵² *Ibid.*, 18 December 1989.

misrepresentations routinely occur when the parties make statements about their own preferences. Similar misrepresentations of fact take place in argumentative situations. Katjuongua also argued that there were regional, economic and infrastructural diversities in society and in the supply of skills and expertise throughout the country that a method of decentralising the government will allow the coming into full play of all these factors. According to him, there was a feeling that the elected majority, without becoming ineffective as a government, must take into account the views of the political minorities of the day, the views that are relevant to national peace and stability, thus avoiding a “tyranny of the majority”. A memorable, well-crafted statement includes historical references that cultivate national memory and unity by building enthusiasm and commitment. Katjuongua’s use of terms such as “tyranny”, “national peace” and “stability” informs his desire to appeal to a larger audience.

One of the sticking points at the Windhoek Assembly was the question of how the constitution was going to be amended. A number of different definitions have been given for the concept of constitutionalism, but one essential element of any definition is the idea of constitutionalism as government limited by the rule of law (McIlwain 1947). Hamutenya had argued that

...it was sufficient to say that the constitution will be amended by a two-thirds majority and that it was not necessary to make provisions that certain things are sacrosanct and therefore cannot be amended.⁵³

This view was echoed by Tjitendero that it should not be a “matter of Act or law that you say even if the circumstances have changed so drastically, we should not change or contemplate an amendment.”⁵⁴ He reasoned that like all documents recording man's hopes and plans, constitutions cannot be immune from the test of time, especially the challenge of unexpected environmental and technological changes and the different concepts and orientation of subsequent elites. Vekuii Rukoro did not share this view. He countered that the constitution

should not be subject to the changing like majorities in parliament at any given point in time, and that is why, for instance...I propose that no amendment of the constitution that has the effect of removing the democratic and republic nature of the state should be entertained at all. But I am reasonable to

⁵³ *Ibid.*, 18 December 1989.

⁵⁴ *Ibid.*, 13 December 1989.

arguments, such as the one introduced by honourable member Dr. Tjitendero that things do change. Times do change and so on, and that maybe to bind oneself in this irrevocable manner for generations to come might be politically unhealthy. But in that case I would then say, instead of a two-thirds, we should require a three-quarters majority as a compromise.⁵⁵

James Madison objected to the rule of law constitutionalism in *The Federalist*. Madison argued that frequent recourse to the amending process would undermine the stability of the government because it would imply that the Constitution was seriously defective (Griffin 1990). Madison noted that the Constitution would benefit from “that veneration which time bestows on everything, and that this veneration would enhance the stability of government generally” (*ibid.* 1990: 200) Finn held a contrary view. He argued that “on one hand, Constitutions are chains with which men bind themselves in their sane moments that they may not die by a suicidal hand in the day of their frenzy. On the other hand, we should keep in mind the dictum of constitutional lawyers, ascribed to Justice Robert Jackson: the Constitution is not a suicide pact. It must be possible to unbind oneself in an emergency. Society must not be confined too tightly” (Elster 1991). Katjiuongua’s argument that constitutions should not be “changed every time a political party wants change or when there is a change in political leadership”⁵⁶, are more in tune with Madison’s views. But Katjiuongua advocated for “a fairly rigid constitution...”⁵⁷ amended only when it is “in the national interest...for the sole purpose of good government...”⁵⁸ He suggested the need to specify which rights should not be amended.

The claim that political decision-making entails the application of reasoning in conditions of irreducible contingency chimes with the classical, Aristotelian, conception of political deliberation as concerned with the future advantage or harm of some course of action. Aristotle was well aware that in politics we have to come to decisions on the basis of claims that are at best probable rather than certain, to act when the grounds for acting are not as solid as we might like. In the bargaining process each party tries to maximise its gains and minimise its losses (Berkovitch 1984). This creates the so-called bargaining problem, that is, whereas bargainers need to reach a settlement, they also prefer one that is most favourable to them. The

⁵⁵ *Ibid.*, 13 December 1989.

⁵⁶ *Ibid.*, 13 December 1989.

⁵⁷ *Ibid.*, 13 December 1989.

⁵⁸ *Ibid.*, 13 December 1989.

mixed-motive nature of bargaining is expressed in the fact that "if they had no incentive to cooperate, they would not bargain at all; if they had no incentive to compete, they would not need to bargain" (Bacharach and Lawler 1981). Given this mixture of competitive and cooperative motivation, the problem lies in determining the exact outcome of any bargaining process, given the range of possible agreeable outcomes within the contract zone (Roth 1979). SWAPO, on the other hand, viewed the African experience in a different light. Problems of many African countries were not a result of executive presidencies, but of inadequate constitutional checks and balances. In the absence of checks and balances, trouble could come from wherever the executive power rested. SWAPO did not share the concern of non-SWAPO parties about executive presidency. It therefore argued strongly in favour of executive presidency, subject to appropriate constitutional checks and balances (Geingob 2004).

Beside this practical pattern of thought, logical arguments have also played an important role in the Windhoek Assembly debates. The necessity for a speaker to address composite audiences is a feature of political life that increases with success and responsibility. It is not always feasible to address these audiences individually. The ability to formulate statements that communicate distinct and perhaps even incompatible messages simultaneously to diverse audiences is therefore crucial to political success. Aristotle recognises distinctions among types of audiences and describes the types of emotions that are important in the persuasion of each (1991).

James Andrews suggests that a speaker confronting a composite audience has two basic choices: either attempt to avoid offending anybody and end up saying nothing, or else simply to write off one or more audiences that there is little or no hope of persuading. While the latter is uninteresting, there is evidence that the latter has been employed by political leaders on significant occasions (Andrews 1983). Nevertheless, this strategy is primarily a way of avoiding the problem and can result in alienating audiences whose support the speaker needs. Perelman and Olbrechts-Tyteca (1969) confront this issue in noting that the need of a persuasive to adapt to the presumptions of such an audience creates a special difficulty: A composite audience, such as a parliamentary assembly, will have to be regrouped as a single entity to make a decision, and it is extremely easy for the opponent of an incautious speaker to turn against him all the arguments he directed to different parts of the

audience, either by setting the arguments against each other so as to show their incompatibility or by presenting them to those they were not meant for.

It was not anticipated that even the appointment of the Secretary to the Cabinet as a civil servant by the president will be a highly contested proposal. But it was. Katjuongua thought the Secretary of the Cabinet should be a politician by virtue of his appointment and must therefore not enjoy the benefits of a civil servant. He suggested that the tenure of office of Cabinet Secretary be “linked to that of the government of the day.”⁵⁹ Barney Barnes of the DTA did not have a problem with the Cabinet Secretary appointed by the president since the position requires trust but argued against the Secretary to the Cabinet being a civil servant. Hamutenya put forward counter-arguments that it does not follow that “because he is appointed by the president he goes with the president that appointed him. There will be stability there in the same way as it applies to the judges.”⁶⁰

Given the seemingly inevitable growth in the power of the new bureaucracy through administrative discretion and law, delegates to the Windhoek Assembly were concerned how power was going to be exercised and how cabinet was going to be composed. They were concerned that the bureaucracy would not be both representative and democratic in composition and ethos and of the kind of oversight that was going exercised over an unelected cabinet. Various options were given such as the system of the US where cabinet members come exclusively from outside and of France where ministers can come from both outside and inside of Parliament – a position which SWAPO wanted. Katjuongua differed:

Mr. Chairman, my position is that the president should appoint a cabinet under a prime minister which enjoys the confidence, majority of parliament, accountable to each and those members are members of parliament, no people from outside for the simple reason that this is going to be too expensive adding proxies to the cabinet. If you have a list of 72 members and you say people are elected as a party, not individuals, then out of those 72 people, when you are putting up the list, you must also put up the list when you have the intention of forming a government that those people are capable of serving as a reservoir for appointments...⁶¹

⁵⁹ *Ibid.*, 18 December 1989.

⁶⁰ *Ibid.*, 19 January 1990.

⁶¹ *Ibid.*, 19 January 1990.

Claims-makers' behaviour also depends on their perception of their audience-perceptions which can be more or less accurate (Toulmin 1958). On the one hand, claims-makers may have occasion to address the converted-individuals belonging to or allied with their movement. So far as this is concerned, Katjiuongua was more successful in convincing members of other opposition parties of the correctness of the wisdom to appoint cabinet members only from the national assembly. At the other extreme, SWAPO members were resolutely hostile to the proposition by Katjiuongua. He was fully aware that regardless of how they were addressed, SWAPO members were unlikely to be receptive of his argument. In between were the audiences deemed persuadable, those who might respond to the right appeal such as Vekuui Rukoro.

The bureaucracy's internal structuring may be as important for constitutional functioning as any theoretical or practicable legislative supremacy. That wonder of modern times is a prime example of the efficacy of a balance of social forces as a means to neutralisation as a political force. A similar representation of the pluralism of society in the vitals of the bureaucracy ensures its constitutional behaviour and political equilibrium. Like Katjiuongua, however, Hans-Erik Staby of the DTA was more concerned with the costs of a huge government prompting a strong response from Hamutenya of SWAPO,

...the expenses of course we can use it when it suits us and run away from it when doesn't sit us. Mr. Staby was very sensitive to the arguments put on the second house, his submission that we cannot advocate a second house, you know there could be payment, you have no problem with that but when it comes to separating the cabinet from the assembly then you see the need for cost, the two don't go together. If you are concerned with cost then you should not make those proposals. If you make that proposal then you must also have lee ways on cost.⁶²

But it was Nahas Angula who provided arguments why ministers should be appointed from either inside or outside of parliament. Angula advanced three reasons: first was that the people elected during the election may not necessarily be cabinet material; secondly he argued that it is always desirable that the government should be broad-based, to be representative of all people and finally he argued

⁶² *Ibid.*, 19 January 1990.

...it is in the best interest that the president is allowed to appoint people from wherever they are, whether they are elected or not elected, on the basis of their competences and the kind of talents they can bring to the administration of the government.⁶³

This discussion was not made easier by the fact that the president of SWAPO had already announced his cabinet before the constitution was approved. Indeed, some members of the cabinet designate were not members of the constituent assembly which was to be turned into a national assembly. Katjiuongua was quite aware of the situation and he let it known that

...the fact that people have been already designated to positions...is the unfortunate part of the whole thing that we cannot talk objectively. It always looks like you are going to hurt somebody. That is a pity, but you can take your decision, I will oppose it and I reserve my right to talk about it elsewhere, but my position is clear there.⁶⁴

Mrs. Ithana appeared to read the attitude of opposition parties incorrectly when she said that "...according to what I have been hearing and what I have been seeing we have reached consensus and according to our procedures..."⁶⁵ to which Katjiuongua quickly snarled a "Minus me"⁶⁶ response. Ithana suggested that the procedures allowed Pretorius an opportunity to reserve his objection, perhaps Katjiuongua can be afforded the same courtesy:

Katjiuongua: Yes, we can do so all the way, I will not agree to something here I cannot defend outside. I am sorry to say so, but that is the situation.

Chairman: But there should be a decision now, otherwise we are wasting too much time because of commitments outside. So since we all have commitments, let's have reservations as we are doing with Mr. Pretorius.

Katjiuongua: No, things I don't believe in myself I cannot defend outside.

Chairman: Yes, but there are also many things we don't believe in, but we are compromising.

Katjiuongua: I compromised a lot as well.

Chairman: The best is that we have reservations and go to the assembly.

Katjiuongua: Yes, no problem.

⁶³ *Ibid.*, 19 January 1990.

⁶⁴ *Ibid.*, 19 January 1990.

⁶⁵ *Ibid.*, 19 January 1990.

⁶⁶ *Ibid.*, 19 January 1990.

Chairman: Let's go to the assembly. Initially I thought we must avoid that but we are not going to have an end. We want people to know who thinks what. So members can go and explain, even if they are going to accept the constitution unanimously areas on which they have reservations so that we all know where we stand, so that our members can know.⁶⁷

The triumph of thoughtless spontaneity is the death of rhetorical ambition. Every speaker needs the tools of rhetoric to stiffen national resolve in difficult times. It is not a failure to understand and exercise this element of leadership; it is an advantage. There is evidence in choices of words such as "defend" and "compromising" that there are strong evaluations associated with political actions. This value system is described with the language of argumentation and so linguistic choices communicate that these leaders place a positive value on competitiveness. This value system reflects a general view of human and social relations that informs the use of language. And a good use of language must find a way to rephrase the national creed, describing an absolute human equality not always evident to the human eye.

Conclusion

With very few exceptions, most of the debates of the Windhoek Assembly were initially built on argument and many of them were solved through practical reasoning. This can be explained in part by the attitude of the members and in part by the constraint of the process. On the one hand, many members were sincerely seeking to reach integrative solutions. Most of them agreed that the very *raison d'être* of the body of which they were members was to bypass the shortcomings of the past and they were inclined to try and overcome divisions based on misunderstandings, prejudice, ideologies or interests. This is by the way compatible with a strategic approach, which could argue that, since they were members of the constituent assembly, their self-esteem led them to try to avoid a failure and predisposed them to accept sincere attempts to build agreements. On the other hand, the process put them under pressure. The variety of their views and the unpredictable nature of many issues, made a logical approach very difficult in most instances.

⁶⁷ *Ibid.*, 19 January 1990.

For one thing, the informative role of deliberation helped the framers of the Namibian constitution to form a more complete set of preferences than they originally had or even forced them to change positions when they were exposed to the full consequences or incoherence of their original proposals. For another, when political actors needed to justify their proposals, they found that impartial arguments were not available or, if they were, they were too obviously tied to a particular interest to be convincing. In this situation, framers of the Namibian constitution had no other alternatives than to change the original proposal for another that took into account the views and interests of others. Such a use of impartial argumentation yielded more equitable outcomes than pure bargaining and increased the overall legitimacy of the process among political actors.

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CHAPTER TWO

RHETORICAL CONSTRUCTION OF DISTRIBUTIVE BARGAINING

It is a practice in any democratic country I know that when it comes to providing facilities, that there is a difference made between women and men for ablution facilities...That is discriminating on the basis of sex. But it is perfectly acceptable in terms of the norms of the democratic state. A woman who wants to go to a man's toilet and everything that goes with it, can go to a constitutional court in a future Namibia and enforce her right to do so...But certainly, hospitals discriminate on that basis. They have women wards and men wards.

Hartmut Ruppel, 1989

Introduction

This Chapter attempts to examine how the rhetorical construction of distributive bargaining impacted on the negotiations for Namibia's constitution at the Windhoek Assembly. The image of distributive bargaining best fit situations which involves haggling over the bigger share of the price. The essential theoretical problem here is to determine why and under what conditions the two negotiating parties – SWAPO, on one hand and the opposition parties, on the other - will make concessions. The chapter will highlight the limits of distributive bargaining in the context of the negotiations of a new constitution for Namibia. While the previous chapter focused on bargaining where negotiating from position is less productive than negotiating from interest, here the interests of more parties are merged into one proposal that eventually becomes a function of discussion. The role of emotions in negotiations is central to this chapter. The chapter will reveal whether negotiation is more than simply a context for social interaction, which creates the conditions for effortful analysis and complex problem solving. The chapter will also investigate if it may be true that preparation and analysis in advance of a negotiation encounter improves one's chances for success. This theory highlights the integrative approach to bargaining, where rhetorical negotiation can be more than a way for one party to win at the cost of another, as participants seek to maximise their interests by also seeking to further the interests of other parties.

Emotional bargaining

Bargaining under the pressure of strong emotion can be one of the toughest challenges for a negotiator. When someone pushes your buttons, you'll want to push

back. A rush of feelings - including betrayal, anger, frustration, worry or embarrassment - can leave you wondering if you can pull yourself together well enough to carry on the negotiation.

The framers of Namibia's constitution were faced with a daunting task of shaping the nation's future without disregarding the past in its totality. But the main question was how and the extent to which the preamble was to reflect the nation's past. A more widely-used strategy in negotiations infers one to learn about the opponent's situation, motivation and reservation value in order to increase the chance of obtaining a favourable agreement. The less the opponent knows about you the less chance they have to obtain a favourable agreement. Hans Erik-Staby of the DTA said that "the preamble must be oriented at the future and not deal with the past."⁶⁸ He noted that the preamble

...must cover essentials only and not embark on emotional things (emphasis added), for which we obviously have understanding...there is a reference for instance to apartheid, racism and colonialism.⁶⁹

This is a very amusing statement as Preambles are by and large epideictic texts, laden with value-statements and calls for higher grounds. It may not have been expected that SWAPO who wanted a reference to apartheid included in the preamble to be told "not to embark on emotional things."⁷⁰ SWAPO won the elections precisely because they have fought on a platform to get rid of apartheid. The well-intentioned remarks by Staby simply reflected his lack of knowledge about what SWAPO wanted. His ignorance was exposed even further when he said that his party, the DTA, agreed in essence, but

*...there are other practices which are equally repugnant. If one takes fascism for instance. If we mention one expressly, the question arises whether we do not condone the others.*⁷¹

Staby's remarks cannot be read in isolation but stem from his party's desire to break with the past. How does a party so very much associated with the apartheid ideology position itself better for a new era without completely negotiating itself out of power? The answer lies in the nature of rhetorical construction of distributive bargaining that

⁶⁸ Windhoek Constituent Assembly, *Hansard of the Standing Committee on Standing Rules and Orders and Internal Arrangements*, 8 December 1989.

⁶⁹ *Ibid.*, 8 December 1989.

⁷⁰ *Ibid.*, 8 December 1989.

⁷¹ *Ibid.*, 8 December 1989.

prevailed at the Windhoek Assembly. Hartmut Ruppel of SWAPO argued that the constitution should make a short reference “to the past...we are not born in a vacuum, we are born as a nation and the background cannot just be disregarded completely.”⁷² Conflict is a natural fact of life. Whether we focus on interactions between individuals or organisations, conflicts are omnipresent. Of the range of emotions that may arise in conflict, anger is perhaps the most prominent and pervasive (Allred 1999). Anger is closely related to fairness judgments (Averill 1982), which play an important role in deal making and dispute resolution. SWAPO was very much aware of the need to transform the Namibian nation from the one infused with colonialism to a new nation built on values of justice, the rule of law and democracy. Ruppel thus proposed to marry the two differences. It was clear that the political and ideological orientations of the two parties were far from each other. Social conflict is a broad term that encompasses different types of conflict situations, which may call for different modes of conflict resolution. In general, social conflict may be said to occur when two or more parties have (or perceive) a divergence of interests (Pruitt and Carnevale 1993). At the Windhoek Assembly, this divergence of interests took on many guises, including political disagreements. As a result, conflicts varied tremendously in terms of the stakes, the likelihood and possible consequences of stalemate and the relationship between the parties.

However, arguments or coding of arguments played a certain role within the assembly. First, the social norm built by the majority of the members fostered this deliberative approach: since voting was excluded, the members were encouraged to argue. Secondly, on some issues, they managed to forge a language which helped them solve incompatibilities through exchanges of arguments. The primacy of ethos as a persuasive appeal can be better understood against the backdrop of the Aristotelian concept of rhetoric as an art that deals with the probable or contingent. In the realm of uncertainty, opinions and educated guesses, the audience especially will attempt to perceive whether the speaker is credible and trustworthy. The better the speaker can impress the audience with his competence, good character and goodwill, the better he can convince the audience to accept not only his version of reality but, importantly, his proposals for dealing with it. On the other hand, if the audience feels he is untrustworthy, incompetent or mean-spirited, the rhetor will face

⁷² *Ibid.*, 8 December 1989.

serious difficulty in persuading them to both his point of view and proposed courses of action. The Windhoek Assembly's discourses can be interpreted through this typology because it helps explain why and how the delegates sometimes solved their incompatibilities through arguments. Dirk Mudge of the DTA made it very clear that a ...constitution is not written for one generation, it is written for generations to come...When anybody refers to apartheid and discrimination and colonialism, I really appreciate your strong feelings about it. But in two or three generations from now, I hope the people will not even know the word *apartheid* anymore...⁷³

Chaïm Perelman (1969) proposed that actors facing strong incompatibilities can employ rhetoric strategies in order to overcome their division by making practical arguments, which seek to resolve concrete problems. Of course, good character and credentials sway only the most fickle of thinkers. Classical orators used ethos not to convince, but to fasten the already established rightness of their cause in the minds of their listeners. It invites them to celebrate "their" success and optimism. This invitation establishes a connection between the subject and the listeners, a bond that allows the speaker to obtain the desired emotional response from the audience.

Kosie Pretorius wanted to other negative "isms" to be mentioned in the preamble. Chairman of the constituent assembly, Hage Geingob, felt it was not necessary to include all the negative "isms". He argued rather that "apartheid is a specific ideology under which we suffered..."⁷⁴ But Pretorius wanted communism included in the preamble because "According to Dr. Crocker...communism and apartheid is the same."⁷⁵ As Geingob (2004) later observed, the victims of apartheid saw this statement as an attempt to cloud the realities of apartheid, and denying its impact on the lives of the majority in Namibia. Tindale (2006) suggests that all theories of argumentation, and particularly those that are normative in force, stress the underlying reasonableness of the activity and ways in which this should be achieved and maintained. But he recognises a practical recognition that arguers have more in mind, even where they are concerned to maintain reasonableness. They may, for example, want to maintain that reasonableness on their own terms and achieve outcomes that are favourable to their own interests, and they will

⁷³ *Ibid.*, 8 December 1989.

⁷⁴ *Ibid.*, 8 December 1989.

⁷⁵ *Ibid.*, 8 December 1989.

measure success in this way. Theo-Ben Gurirab of SWAPO objected to the exclusion of the word *apartheid* in the preamble as

...it would be injustice done to the future generations of Namibia if we were to, in our constitution which we are now charged to write, deny them their history, both the good of it and its negatives. All the good constitutions recall history, the circumstance under which they have been brought into being, and on that basis they project a better future.⁷⁶

Negotiators seemed to use the information about the other's emotion to inform their own negotiation strategy. It should be noted, however, that negotiating is a complex and cognitively taxing venture. Negotiators needed to keep in mind their own preferences and limits, and, at the same time, monitor the opponent's behaviour, try to locate their limits and combine all this information to design an optimal strategy. The question thus arises whether negotiators are motivated to mobilise their scarce cognitive resources to pay attention to, scrutinise and process the strategic information that is provided by the opponent's emotions.

Lax and Sebenius (1992) argue that negotiation based on positions tend to devolve into contests of will. They are less successful by any measure. Incompatible positions may be backed by compatible interests and so negotiating on interests is more likely to produce fair, mutually beneficial outcomes without generating added hostility. In addition to separating interests from positions, it is helpful to generate a wide range of possible solutions before trying to come to a decision. It is also helpful for the parties to agree on the criteria by which possible solutions will be evaluated before actually setting down to evaluate the proposals.

If a party can change the opponent's perception of what is a good deal and why it is important for the other party to conclude the negotiations, then the party has a greater chance to obtain a favourable agreement. Seen from this prism, speakers prefer to describe themselves in positive terms. The strategy is widely-used to present oneself in a positive light or at least to avoid a negative impression and in general to manage the impression on one's interlocutors. The same is of course true in most forms of public discourse, where making a good impression may even be more important than in informal everyday life conversations, for instance because of the more serious impact on a larger audience, as well as the political damage that

⁷⁶ *Ibid.*, 8 December 1989.

may be the result of a 'wrong' presentation of Self. This is particularly important in politics, where a *faux pas* may cost votes at the next elections. The lessons from the discussion on the reintegration of Walvis Bay into Namibia provide useful insight why politicians want to present a positive self. In 1977, as Namibia began its movement towards independence, South Africa issued a proclamation which declared that Walvis Bay will cease to be administered as if it were part of the territory. Beyond the historical and legal grounds for asserting control over Walvis Bay, South Africa had advanced its own various vital interests in maintaining the enclave. It was not by accident therefore that members of the constituent assembly had wanted to debate the territorial position of Namibia, including Walvis Bay. Among the first to take the floor was Dirk Mudge. His remarks were striking because he made an effort to associate himself with the position favoured by the majority. Ultimately, he wanted to be seen to be speaking for the people:

Let us get absolute clarity on the question of the territory of Namibia. I am not hundred percent sure, for instance the DTA – and I am sure Mr. Katjiuongua mentioned it the other day – is also concerned about the southern border. We feel it must be the middle of the Orange River and I think we must get absolute clarity among ourselves on the issue of Walvis Bay and the islands on the coast. I don't think we should bump our heads against a legal situation. We must take that into consideration. All of us agree we want Walvis Bay, but we also have to consider the possibility of negotiations about certain areas. Can we just identify that as a point that will have to be properly investigated? I don't want to argue about it at this stage.⁷⁷

Moses Katjiuongua also used positive rhetoric to create a positive self when he said he agreed that a constitution is a long-time document,

...I don't care so much about expressed will by the international community, but think as we ourselves understand it to be what is Namibia, I think we must try to put in the constitution everything that we think is Namibia. Maybe the only colleagues who have a point of difference here are the FCN who in their proposal say South West Africa as it exists today. That might exclude Walvis Bay and some other places. Maybe they can tell us what the problem is.⁷⁸

⁷⁷ *Ibid.*, 8 December 1989.

⁷⁸ *Ibid.*, 8 December 1989.

But there was another negotiator on the other side, who also used authority to carry weight in distributive bargaining. SWAPO's spokesman on foreign affairs, Theo-Ben Gurirab, presented his party's uncompromising position:

...whatever the future arrangement are going to be between Independent Namibia and South Africa, as Namibians we should define the territory of Namibia as being inclusive of Walvis Bay and the island and the southern border being the middle of the river. Resolution of the outstanding dispute, we will find ways to handle that - whether by negotiations or internationally in court.⁷⁹

Staby of the DTA was "not entirely certain as to whether it would be correct to refer to Walvis Bay and the islands as an integral part of the territory of Namibia from a legal point of view."⁸⁰ Hage Geingob's argument was that UN Resolution 432 which specifically addresses the question of Walvis Bay does not say "you must negotiate...it says it is part and parcel of Namibia, it must be re-integrated after independence."⁸¹ This argument was countered by Pretorius that

...this is not legally correct, and I am in favour of negotiations in this connection, because this will mean in legal terms annexation. I think 432 is a political decision, not a legal decision, and if we are able to do this, South Africa could have annexed the country before us.⁸²

According to Aristotle, character and emotion are constitutive features of the process of deliberation. This means that in order to render a determinate action-specific judgment, deliberation cannot simply be reduced to logical demonstration. Thus, he saw rhetoric as needed to make people see and understand one's point of view. The exchanges of arguments at the Windhoek Assembly took leaf from Aristotle's conclusion. Geingob had a short reply that

...the resolutions of the United Nations are part of the sources of International Law - it is not just a political decision. This is going to be in an international court, not any other court and resolutions of the United Nations are sources of International Law.⁸³

His position was affirmed by Ben Amathila of SWAPO who argued that

⁷⁹ *Ibid.*, 15 January 1990.

⁸⁰ *Ibid.*, 15 January 1990.

⁸¹ *Ibid.*, 15 January 1990.

⁸² *Ibid.*, 18 January 1990.

⁸³ *Ibid.*, 15 January 1990.

...if one takes Resolution 432 of the Security Council of the United Nations as a basis for future litigation or discussions - that at least our constitution has to establish that claim. If you don't establish it, obviously it might weaken one's case against South Africa's position.⁸⁴

The provision in UN Resolution 435 gives recognition that Walvis Bay including the 13 islands will be re-integrated into Namibia and that the United Nations will help a new nation to get those territories re-integrated in the country.

During a discussion of a clause on discrimination, political parties were at pains to avoid to be seen by the voters as opposing certain proposals sponsored by the opposition. They attempted to portray a positive attitude to the Namibian people. A key figure in the committee, Dirk Mudge, while sceptical of affirmative action, had some kind words:

Just not to be misunderstood I said that we are in favour of affirmative action...We even, in one of our policy documents; use the words, "wieder guttmachung." Translated into English means that you have to compensate somehow for damages done...but...you must make it very clear that it is going to be affirmative action and that it is not going to be discrimination in reverse...I am concerned about the formulation because read by somebody who is not well informed and read by somebody who is suspicious, this might create serious problems...I was only hoping that when it comes to very sensitive issue like this, that we will be able to sit down and discuss it responsibly. You can have my word that we as party has (sic) a lot of understanding for the fact that some people, because of the laws of the past, lagged behind. For instance the fact that they could not own property, just to mention one we have not made a secret of it on public platforms and we believe in the principle. But when it comes to the inclusion of such a thing in the Bill of fundamental Rights, I think we must think very carefully when it comes to formulation.⁸⁵

The rhetoric of concession

In negotiation, a first offer can serve as an anchor that biases the other party's judgments of the underlying structure of the bargaining encounter (Neale and

⁸⁴ *Ibid.*, 15 January 1990.

⁸⁵ *Ibid.*, 8 December 1989.

Bazerman 1991). Anchoring can be examined in a single-issue distributive bargaining context by looking at the extremeness of a counteroffer, that is, the distance between one party's initial offer and the other party's initial counteroffer. There was general agreement between the framers of the Constitution at the Windhoek Assembly that executive power should not be unchecked. There were, however, differing views on how these powers could be subjected to oversight. One finds evidence of similar concerns during the constitutional debates at the Federal Convention in Philadelphia. "The decision to establish the office of the president caused 'considerable pause', according to James Madison. Virginia's George Mason feared that the office would create a "foetus of a monarchy." But with Congress and the Court holding sufficient countervailing power, the framers were able to establish an office that was powerful yet under control" (Geingob 2004: 127). DTA had argued that providing for a constitutional head of state would be in line with the Westminster type of democracy. According to the subdivision of the *ad hominem* arguments by Walton, this argument by the DTA should be classified as a circumstantial *ad hominem*. It was interesting that the DTA opposed executive presidency despite the fact that in South Africa, with whom DTA had longstanding relations, there was an executive state president. Concern was also expressed that executive presidencies in Africa were not on the whole successful. Going forward, Mudge presented proposals that were meant to break the impasse. His party wanted a parliamentary head of state because such a parliamentary head of state

assures the upholding and, indeed, safeguarding of a certain democratic doctrine of separation of powers in so far as the president, as head of the executive, is guided by the wishes of his executive and cannot encroach either on the powers of the legislature or the judiciary.⁸⁶

It was implied that the parliamentary head of state is in fact the guardian of the doctrine of the separation of powers by assuring that the judiciary remains independent at all times, that the legislature embodies the wishes of the people and that the executive follows the demands of the legislature. Mudge's intention to persuading his listeners had to be concerned not only about the logical proofs but also about affecting the appropriate emotional response in the audience and about inducing the audience's confidence in his good sense, goodwill and virtue. Every use

⁸⁶ *Ibid.*, 14 December 1989.

of rhetoric immediately raises issues of motive and intention and at the same time makes those issues nearly impossible to resolve authoritatively. As a practical matter, a persuasive discourse is not merely a collection of arguments to act in our own best interest, but depends fundamentally on projecting a convincing depiction of the speaker's character, competence and intentions. The classical tradition of rhetoric goes beyond the orator's act of communication to his qualities of character or *ethos*. A model orator is necessarily morally virtuous and could only persuade if his behaviour met with social approval. This means that a public speaker is able to portray the standards acceptable to the audience.

Other things being equal, a counteroffer will be closer to the value of the initial offer if the party making the counteroffer has been anchored by the initial offer than if not. Further to that, as with most negotiations, the delegates at the Windhoek Assembly laboured under the assumption that 'nothing is agreed until everything is agreed' it proved very difficult, in the end, to exchange concessions across issues. And while this prevented the final outcome from being hostage to a few issues, it may also have prevented useful trades between parties that had different intensity of preferences. Fisher and Ury (1981) believes that this bargaining stance is referred to as "positional bargaining," "contending" or "contentious bargaining". Distributive bargaining implies an effort to dominate the negotiation through the use of pressure tactics, persuasive arguments and threats". Kosie Pretorius was quite aware of the availability of tools. Returning to the discussion on discrimination, Pretorius chose to apply arguments:

I know the German law is making provision for it by adding the words "no person may be wilfully or intentionally discriminated against." It is very important, because for example for me not having a legal background, if you and Mr Mudge ask me to fetch you a cup of tea, and one of flasks is already empty after I have poured your tea, and I pour out of the other flask for Mr Mudge and the one cup of tea is warm and the other is cold, that is discrimination, but it was not wilfully. So, it is very important for me...because I will not be the government, and I never thought about it. But during the tea-pause Mr Mudge said he thought he would be the president. So, it is important to me that we say not being discriminated against. It is not so easy

for the courts to make the difference. I think we must ask the specialists about this.⁸⁷

Scholars define bargaining power in various ways, but they all boil down to just one thing: the ability to convince the other side to give you what you want even when the other side would prefer not to do so. Accomplishing this task demand the ability to make arguments that gets accepted. Numbers or personalities are nice to have. But none of these assets guarantees the ability to exercise bargaining power in any particular negotiation. Pretorius found out quickly from Rukoro:

I think when it comes to this thing, discrimination is absolutely prohibited. The question of your state of mind is totally irrelevant - whether you intended it or not.⁸⁸

Pretorius unexpectedly found an ally in Hartmut Ruppel, SWAPO legal advisor. A leading assumption in coalition formation is that people aim to maximise their own payoffs. Ruppel's arguments in support of Pretorius are worth quoting verbatim:

I agree for once with Honourable Mr Pretorius that there should be a slight qualifying clause. We discussed it when we had certain deliberations on our draft. Take for instance discrimination on the basis of sex. It is a practice in any democratic country I know that when it comes to providing facilities, that there is a difference made between women and men for ablution facilities...That is discriminating on the basis of sex. But it is perfectly acceptable in terms of the norms of the democratic state. A woman who wants to go to a man's toilet and everything that goes with it, can go to a constitutional court in a future Namibia and enforce her right to do so...There are many, I just thought of this sexual one. But certainly, hospitals discriminate on that basis. They have women wards and men wards. I think if there is a very explicit provision to be made, it will not be frivolous. I think the example of the toilet may not be the most appropriate one. There are very democratic countries where women are not allowed to be co-signatories to their bank accounts or property and all that. I just wanted to give an example.⁸⁹

⁸⁷ *Ibid.*, 8 December 1989.

⁸⁸ *Ibid.*, 8 December 1989.

⁸⁹ *Ibid.*, 8 December 1989.

In a bargaining interaction, the negotiators should be able to survey the political environment and evaluate the initial distribution of power. Specifically, the negotiator with the most advantageous best alternative to a negotiated agreement will enjoy relative power over his or her counterpart because he is in a better position to walk away if he doesn't get what he demands. Mudge was fully aware that he did not have the numerical strength to shoot down the proposal but was able to put forth counterarguments:

I am afraid the word "discrimination" has got a specific connotation, something which is wrong and I cannot agree that you can qualify discrimination. As far as concerned, discrimination is discrimination - unless you find a better word. I am not saying this only because of the connotation; I am also saying this because I know why Mr Pretorius wants those words in there. We have discussed it before. He maintains that if he has a school in which he wants to educate people in a specific culture and tradition and language and religion which, in the end, will boil down to racial discrimination, he will be able to defend it on the grounds that it is not discrimination, but in fact differentiation, or something like that. If we really want to have peace in this country, then we must avoid making provision for any form of discrimination. The way I understand discrimination doesn't mean that I say that from now on my wife will have to open the door for me when we get in to the car. I think we all realise that in some cases there will have to be special provision for women. There will be special provision for the handicapped. There will have to be special provision for many other categories of persons. But then we have to find another word. The minute you qualify discrimination then you look for trouble and I speak from experience. I don't want to discuss the merits, all I want to say is that I will not support any proposal in that paragraph. Not now. I think we can discuss the paragraph that I am prepared to do.⁹⁰

Negotiators should balance these front-end and back-end costs to determine whether to push for more precision in the deal at hand. This approach may lead to opposite conclusions. Negotiators need not worry as much about vague terms if they have a cost-efficient mechanism for resolving disputes that may arise. When lack of trust threatens to derail your negotiation, one solution is to stop arguing about the

⁹⁰ *Ibid.*, 8 December 1989.

structure of the deal and instead reshape the negotiation process. Lack of trust is never a good thing, but it's most problematic when negotiators perceive themselves to be vulnerable to exploitation. Changing the negotiation process can help mitigate risk and make distrust less of a barrier to deal making.

Negotiation is more than simply a context for social interaction. The negotiation encounter creates the conditions for effortful analysis and complex problem solving. It may be true that preparation and analysis in advance of a negotiation encounter improves one's chances for success (Lewicki et al. 1994; Murnighan 1992). If a negotiator plans his or her first moves, for example, he or she will be less likely to be influenced by the other party's first offer. Proper planning provides an antidote to many of the tactics commonly used in distributive bargaining. During the debate on the bill of right on 8 December 1989, Pretorius expressed the view that

...it is very important to me that you have in any Bill of Rights the necessary balance between rights and responsibilities, guarantees...We are stressing the balance between individual and group rights...⁹¹

In support of his argument, Pretorius made reference to the UN Declaration of Human rights. What pragmatic reasons does the act or strategy of alluding to the UN Declaration of Human Rights create for Pretorius? He probably may have reasoned that, other things being equal, he could not deny the premise without risking criticism for ignorance about what one of the nation's founding documents stated. This is a pragmatic reason for acknowledging premise adequacy. But Pretorius' analysis or lack thereof did not serve him well judging by Mudge's sharp reply to the proposal of Pretorius:

I cannot agree at all with Mr. Pretorius, and he knows that I will never support that a group has a fundamental right. I cannot accept that, because right now I am terribly concerned about the situation where a group – and they consider me to be part of that group – is trying to privatise schools and that will directly affect my position. I want to be free...⁹²

Mudge found an ally in Vekuii Rukoro who was “not so comfortable”⁹³ with Pretorius' position, “normally this thing is identified with repressive regimes that tries to take

⁹¹ *Ibid.*, 8 December 1989.

⁹² *Ibid.*, 8 December 1989.

⁹³ *Ibid.*, 8 December 1989.

away what they are giving with another hand...”⁹⁴ Rukoro was also strategic in appealing to patriotism. Not feeling patriotic serves as a fallible sign that one is unpatriotic, does not recognise the allusion or does not understand the fundamental position of the premise of a new nation being created by the very act of constitution-making. Thus, appealing to patriotism compels recognition of premise adequacy. However, the goodness of arguments is determined by the acceptance of the interlocutor, the badness of arguments by the refusal to do so.

In general, distributive bargaining tends to be more competitive. Common tactics include trying to gain an advantage by insisting on negotiating on one's own home ground; having more negotiators than the other side, using tricks and deception to try to get the other side to concede more than you concede; making threats or issuing ultimatums - generally trying to force the other side to give in by overpowering them or outsmarting them, not by discussing the problem as an equal. Often these approaches to negotiation are framed as incompatible. Long (1952) reminds us that the amoral concept of administrative neutrality is the natural complement of the concept of bureaucracy as an instrument. According to Katjiuongua, the seat of reason and conscience resides in the legislature. He made the argument in the context that all senior appointments made by the president should be ratified by parliament as is the case with United States. Whatever grudging concession may be made to the claims of the political executive and a major task of constitutionalism is the maintenance of the supremacy of the legislature over the bureaucracy. The latter's sole constitutional role is one of neutral docility to the wishes of the day's legislative majority (Long 1952). At the Windhoek Assembly, the majority party, SWAPO, argued against Katjiuongua's proposal. Hartmut Ruppel argued that the president “must not every time run back to the legislature”⁹⁵ every time there is an appointment to be made, citing the principle of separation of powers. Pendukeni Ithana argued that

...we may scare some of the people who would do a better job if they are given that opportunity, if we will subject their lives to be discussed in parliament.⁹⁶

⁹⁴ *Ibid.*, 8 December 1989.

⁹⁵ *Ibid.*, 18 January 1990.

⁹⁶ *Ibid.*, 18 January 1990.

Katjiuongua was not convinced. He argued that the proposed method makes sure that the president would not employ criminals. He concluded that he “cannot agree to things here which I cannot explain outside to my people.”⁹⁷ From the discussions, it was apparent that differing proposals had different intended purposes. Dirk Mudge agreed that

...it is not for a legislative body to discuss appointments...The alternative is that we make sure...that the Judicial Service Commission...must be appointed in a very, very responsible manner.⁹⁸

His thinking was that if the Judicial Service Commission is properly appointed, judges would not need to be confirmed by the national assembly. Mudge’s argument should be seen in the context of Friedrich’s contention that the essence of constitutionalism is the division of power in such a way as to provide a system of effective regularised restraints upon governmental action. The purpose of this division of power is not to create some mechanical equipoise among the organs of government but to represent the diversity of the community that its own pluralism is reflected in pluralism within the government (Friederich 1950).

Fisher *et al.*, authors of the negotiation best-seller *Getting to Yes*, say that integrative bargaining is superior to distributive bargaining in most, if not all, circumstances - even in situations in which something is to be divided up. By cooperating and focusing on interests rather than positions, they argue that the pie can almost always be enlarged or some other way can be found to provide gains for all sides. Other theorists suggest this is naïve that distributive situations requiring competitive or hard bargaining often occur. In any argument, statements about grounds provide the basic facts which serve as the foundation for the discussion which follows. Obviously, facts are themselves socially-constructed knowledge. Claims-makers and their audiences may agree to accept grounds statements without question or one or both parties may have reservations about the statements’ truth and their relevance. The discussion on the functions and powers of the proposed second chamber of parliament again provides useful insights. Moses Katjiuongua had proposed that the second chamber will act as a body of review for legislation – through the exercise of a delaying function “by simply allowing time for a deeper

⁹⁷ *Ibid.*, 18 January 1990.

⁹⁸ *Ibid.*, 18 January 1990.

material reflection and not simply a frustration of that decision-making process.”⁹⁹ It is unclear whether Katjiuongua had John Locke in mind when he made this proposal. Locke, writing the apologia for the *Glorious Revolution* and its accompanying shift in political power, held that “there can be but one supreme power, which is the legislative, to which all the rest are and must be subordinate” (1947: 87). To be sure, Locke conceived of the legislature only as the fiduciary of the people, from whom all legitimate power ultimately stemmed. But since the legislature was considered the authentic voice of the people changeable only by revolution, this limitation could be forgotten in practice. Despite Locke’s qualifications, the latter-day exponents of his views have given currency to what Jackson called the “absurd doctrine that the legislature is the people” (*ibid.*: 88). Angula of SWAPO was not convinced of the arguments that have been advanced by Katjiuongua. He understood the rationale to address the fears of a minority but did not believe that there were people who could be classified as a minority because

certain tribes are even more representative than others in terms of numbers, and if a decision is going to be taken in the National Assembly I can’t see how certain regions or whatever it is, tribes, ethnic groups, minorities are going to be left out from the decision-making process.¹⁰⁰

Rukoro was without frustration in response to Angula that the framers of the constitution were moving in a very dangerous slope given the type of interpretation of the argument presented. He warned that

...we will end up in a deadlock which could be very disastrous for this whole exercise. At this point in time I would love to respond to what he has said, but I am afraid I will simply contribute to what I am trying to avoid.¹⁰¹

Each party will typically stress the factual aspects of the situation that support its own position, and neglect others. Other parties may in turn be counted on to expose this bias, so that in the end a more balanced picture emerges (Elster 1992). Clearly, Rukoro’s remarks pointed to a desire to reach an agreement. In a seminal article on the role played by the unanimity decision rule in the political system of the EU and its inherent consequences (the joint-decision trap), Fritz Scharpf (1985) drew the attention of scholars to the implications of formal rules. He wrote that decisions made

⁹⁹ *Ibid.*, 8 December 1989.

¹⁰⁰ *Ibid.*, 19 December 1989.

¹⁰¹ *Ibid.*, 19 December 1989.

by national governments under the unanimity decision rule will systematically lead to suboptimal policy outcomes creating “the joint-decision trap” (Scharpf 1985: 48). The Windhoek Assembly members found themselves in a similar situation where decisions had to be reached – not by voting, but by consensus. The requirement of the unanimity decision rule can be expected to produce stalemate and deadlock because joint decisions under the unanimity decision rule express the position of the most reluctant actor and preserve the institutional *status quo* (Scharpf 1985).

Bargaining and the politics of (mis)trust

Lax and Sebenius argue that the bargaining processes consist of “an attempt by two or more parties to find a form of joint action that seems better to each than the alternatives” (1986: 11). Moravcsik, in turn, referred to it as “the process of collective choice through which conflicting interests are reconciled” (1993: 497). As stated before, politics being largely about images, various representatives at the Windhoek Assembly were concerned about how their constituencies would perceive their interests being addressed by their elected representatives. White representatives were concerned about their languages; namely, German and Afrikaans. Pretorius identified as a possible area of dispute and proposed that the question of the role of languages in an independent Namibia be referred to a committee. Hartmut Ruppel had a problem with Pretorius placing on record language as a point of difference:

If the honourable member wants to say that this is a matter which should be dealt with another committee, then that must be clearly stated. It is a political decision. We cannot just say there is a difference and then just leave it like that. We must decide what we are going to do with this difference. Is it a difference which will be referred or is it difference where we will just use our combined vote against you?...We have to be practical and we don't want to be going on matters in committees where it is quite clear that only a very, very minute minority, although they may be washed away in any event by the consensus in this committee. So, we must be practical. Otherwise we will find all sorts of small differences which really don't matter and they will all be subject to lengthy discussions in committees...¹⁰²

¹⁰² *Ibid.*, 8 December 1989.

What are the ethical implications of the negotiation? Negotiators must implicitly acknowledge the legitimacy of each other's interests and claims. Failing to recognise someone's status appropriately could trigger negative emotions. Identifying and respecting your fellow negotiators' areas of status is likely to improve rapport and mutual cooperation - and keep heated emotions from brewing. That said, negotiators often commit the error of attributing people's behaviour to their character rather than the situation. As a result, negotiators are biased toward dismissing negotiating partners based on past history. This was true of white delegates who were perceived to be racist. Pretorius pleaded with the committee that

...for the sake of the feeling of our people and also the other language groups, that something is not done overnight. So, it is important to me that there is the exception of the fact that you have the right to talk your language even in public schools up to a certain stage.¹⁰³

SWAPO was determined to remove any symbols of apartheid and proposed that English shall be the official language. This is clearly discernable from Tjiriange's intervention:

I am trying to understand the honourable member. His concerns are already covered. What he says is that he wants the groups to reserve the right to talk their languages in schools and that is exactly what is said. So it is covered...¹⁰⁴

Chairman of the committee, Hage Geingob, summed up Pretorius' fears, "It seems that Mr Pretorius thinks once independence comes, English will be spoken, Afrikaans stops. That is not what this means."¹⁰⁵ Will that not be the effect of this? Pretorius had asked.

Many countries across the globe have begun transitions from authoritarian rule to democracy, marking what has become popularly known as the "third wave" of democratisation Garro (1993). Garro explains it this way because the institutionalisation of the rule of law helps the new democratic state achieve two important goals: the realisation of a clear break with the past, and the development of a constitutional culture which teaches state actors that the legal bounds of the system cannot be transgressed for the achievement of partisan political gains. As the

¹⁰³ *Ibid.*, 8 December 1989.

¹⁰⁴ *Ibid.*, 8 December 1989.

¹⁰⁵ *Ibid.*, 8 December 1989.

rule of law is espoused during the transition, democratic procedures of government become more secure and the new political system can progress more smoothly toward consolidation. Ideally, through the application of judicial or constitutional review, judges cannot only mediate conflicts between political actors but also prevent the arbitrary exercise of government power. In fulfilling this role, the courts become powerful actors in maintaining the submission of the state to law. Nonetheless, the ability of the courts to fulfil this role is by no means automatic. Instead, it is heavily contingent upon the independence of the judicial branch. It is normally believed that without independence, the judiciary can be easily manipulated to prevent it from questioning the illegal or arbitrary acts of state actors. The framers of the Namibian constitution were challenged to design a formula on how judges were to be appointed in order to preserve their independence. Eric Biwa of the United Democratic Front suggested that the president should nominate a judge, which nomination should be done in consultation with the Judicial Service Committee, and subjected to the approval of parliament by a two-thirds majority. Parliament was essential in the avoidance of judges who may be favoured by a single party. Biwa's proposal resonated with Alexander Hamilton's argument that

Ideally, public opinion should be irrelevant to the judge's role because the judge is often called upon to disregard, or even to defy, popular sentiment. The Framers of the Constitution had a similar understanding of the judicial role, and as a consequence, they established that Article III judges would be appointed, rather than elected, and would be sheltered from public opinion by receiving life tenure and salary protection.¹⁰⁶

At the Windhoek Assembly, Hamilton found another ally in Katjiuongua who proposed that judges' be appointed for life "so that they know they might not be removed."¹⁰⁷ Dr. Tjitendero of SWAPO did not disagree with the preposition for a life appointment of the judges but wanted a proviso that for the first group of judges, their term should be limited to a number of years. Vekuii Rukoro was against the proposal of judges serving a limited period. He proposed the US system where judges go through confirmation hearings and serve for life and can only be removed for incompetence or gross misconduct. But SWAPO's real intentions were revealed by Peter Katjavivi who

¹⁰⁶ *Ibid.*, 15 December 1989.

¹⁰⁷ *Ibid.*, 15 December 1989.

...was concerned about inheriting judges from the old dispensation...the fear that judges who were on the opposite of the struggle would continue to operate from the bench despite their age.¹⁰⁸

The strategy here was to get the opposition parties to think that the proposal was the best and there is a chance that it can be accepted even if it may not be one which the opposition parties had wanted. However, SWAPO did not try to get the opposition parties think that the proposal was all they could get or that they were not capable of getting more. It was important then that the opposition parties were satisfied they got a very good deal. In this instance, the process of picking a person to be a judge is woven into the political fabric and is, by any definition, a political process. Accordingly, it would be unrealistic to suggest that it is possible totally to remove politics from the process of selecting judges. Rather, the goals should be to limit, to the extent feasible, the impact of partisan politics; and to minimise the effect of other political considerations on the process. The argument that it is important not only that judges be independent, but that they be perceived as independent as well, runs as follows. In our society, the power and authority of the judiciary depend upon the public's continued respect and support for that institution. One of the cornerstones of our system is respect for the "rule of law." Therefore, the public's degree of respect for the judiciary bears a direct correlation to the belief that judges will decide cases fairly and impartially, in accordance with the "rule of law"—that decisions will be reached based upon the facts and the applicable law, without regard to extraneous influences, whether in the form of special interest groups or popular opinion. This is a powerful argument to oppose.

There was a proposal in the draft constitution to give powers to the president to nominate six people to the national assembly. SWAPO wanted this clause retained. The minority parties were divided with the NNF supporting SWAPO on the grounds that people with certain expertise may not be good with politics and could be brought in on the basis of the proposed clause. Dirk Mudge argued that his party "could not support appointed members to an elected body...I rejected it entirely and completely."¹⁰⁹ Katjuongua also did not support the clause because

¹⁰⁸ *Ibid.*, 15 December 1989.

¹⁰⁹ *Ibid.*, 15 December 1989.

...it will be an insult to 72 members, elected members in this House to go and look for a talent outside...to say we are not good enough, we don't have the expertise, we have to bring in somebody from outside...¹¹⁰

The chairman of the assembly summed up the debate that the "majority seems to want retention. We must be democratic in our outlook."¹¹¹ It follows, then, that focusing on interests rather than positions encourages a cooperative approach. Negotiators can build cooperative momentum by exhibiting a strong early commitment to cooperative attitudes. A particular negotiation may be located within a larger relationship and an ongoing series of dealings. A past history of cooperative dealings can create the expectation of further cooperation. Shifting the focus to maintaining trust and relationships also encourages cooperation. Lax and Sebenius also note that "when the negotiation is in fact one of many similar repeated encounters; the negotiators may be able to mitigate claiming in subsequent rounds by agreeing initially on a principle for division of gains" (1992: 58). Negotiators may stress norms of appropriate behaviour, such as being reasonable, civilised or fair, which favour cooperative behaviour. Over time these norms can become internalised.

Conflict at the Windhoek Assembly

The question of conflict management is closely related to the question of how power is exercised. Disagreements about cause-effect relationships and objectives lead to conflict and the greater use of power. Debate involves an agreement to engage in exchange. The agreement is that although a person has the right to have his argument weighed, he must also weigh the arguments of others. This position manifested itself at the Windhoek Assembly in a debate about whether a president should be elected directly by the people or elected by the national assembly. Katjuongua reaffirmed what he "understood to be the agreement whereby the first president for the five years will be elected by parliament and will be a member of parliament."¹¹² He held the view the assembly should decide between the powers of the president in the period of transition, the five years and how to relate that to the

¹¹⁰ *Ibid.*, 15 December 1989.

¹¹¹ *Ibid.*, 15 December 1989.

¹¹² *Ibid.*, 15 January 1990.

other powers, and then the powers of the president permanently, what they will be in relation to the other institutions as well.

If we say the president is elected by the people, the name of that person must be on a ballot box for election by the people. You can't turn the leader of the majority party ultimately into the president. So, therefore I think we should not have too many elections...At the end of the day as long as we have a party-system – I think it will be very clear to the people. I don't think we will confuse people. Let's take the position today. If you say the party, SWAPO, wants its leader to be the president of Namibia, the candidate, then they put that name on the ballot and SWAPO, the same party wants members to the National Assembly and regional councils. In essence really people are voting for the same party, not different parties, and the same thing will apply to all the parties. So at least we minimise the number of elections. Which means the president is elected now directly by the people, whoever that might be, so it is not just to parliament.¹¹³

Dr. Tjitendero argued that he did not see any reason, if the law or the practicality of the situation requires that in the interest of separation of powers, why the president cannot step down “from being a member of parliament so as to facilitate the desire that we are trying to establish in terms of separation of powers.”¹¹⁴ Whether or not there was a misunderstanding, the DTA argued that all future presidents should be elected by the national assembly sitting as an electoral college. Mudge argued thus:

I want to make it very clear, when we discuss this constitution and discuss the position of a President, we are not discussing Mr Sam Nujoma or Mr Biwa or any other person, we are discussing the position of a state president, because political leaders will come and go, but the constitution must be the stable and, as we see it, the everlasting basis for state institutions and the rule of law. I can refer you to the history of the world, maybe I should not, but I can refer to Washington, but I can also refer to Hitler and Iddi Amin, and I am sure you will know the difference. We will feel very strongly about the concentration of power, because as we see it power corrupts and absolute power corrupts absolutely. The proposals in the working document, as I see it, have the

¹¹³ *Ibid.*, 15 January 1990.

¹¹⁴ *Ibid.*, 15 January 1990.

inherent danger of establishing the system whereby the head of state exercises absolute power.¹¹⁵

Gurirab reaffirmed SWAPO's position that head of state of Namibia must be elected by the people by popular vote. But Mudge found the proposal

...as we see it, politically unwise, and practically impossible. The direct election of a president in accordance with the SWAPO proposals, or the working document emphasise ethnic divisions, and I think we must do everything in our power to avoid that, because such an occurrence could very well lead to national disunity...Politically the proposal for a directly elected president is unsound and dangerous, because it denies the existence of a multi-party system and begs for the...creation of a one-party system. That is our view.¹¹⁶

This magpie-like tendency to pluck lines and ideas from here and there and meld them into a coherent whole is inherent to good speechmaking and part of what made Gurirab effective at the Windhoek Assembly. It has allowed him to adapt quickly to rivals' attacks, which he often absorbed into his remarks, parroting them and turning them to his and SWAPO's advantage. The choice of point of departure is a powerful rhetorical device. It ensures that the audience knows what is to be talked about, but it also indicates what the speaker regards as focal. SWAPO was determined to have its president elected universally. Gurirab's point of departure was striking:

For all the things that we have ascribed to him, embodying as it does the national consensus, the will of all the people, that person, more than any other public official, must carry the will of the people. That remains the solid unquestionable position of SWAPO. So, there you have it on the table, honourable Chairman. If that would mean that we would reopen the discussion, so be it. If it means that we must vote on it, so be it. At this point I am not really, in this particular issue, interested in us going back, wasting time on what the minute said. SWAPO's position is that the president of the republic must be elected by popular vote and I shall come back to it for much as that will be required.¹¹⁷

¹¹⁵ *Ibid.*, 14 December 1989.

¹¹⁶ *Ibid.*, 14 December 1989.

¹¹⁷ Windhoek Constituent Assembly, *Hansard of the Standing Committee on Standing Rules and Orders and Internal Arrangement*, 15 January 1990.

This was SWAPO's bottom-line. Nothing in the world would have them change the position. Mudge attempted to convince the members that minutes of the committee actually support his claim. Gurirab responded that "rereading the minutes will not change SWAPO's position". Mudge was disappointed:

...we will have to report back and we are also responsible to report to our supporters and our people and we don't want to be blamed for the fact that we have to delay the process now. I just want to make that clear and I am sure that you will also understand that we have informed our people that we are making progress, we have informed them that we have reached consensus on the position of the president, amongst others, and now we have to go and inform them that apparently there is a misunderstanding, apparently we haven't reached consensus.¹¹⁸

It was beginning to become clear that this was the argument the minority parties were not going to win. This is very much evident from a statement by Biwa that his party was prepared to go along with an arrangement or a provision where the president is elected directly by popular vote, provided that

the powers conferred upon the president and the limitations put to the exercise of this powers are not affected in any way...that parliament has the power to impeach the president and I think that is provided for in the constitution, and we would like to agree well in advance, while on this issue, that we will allow the parliament to impeach the president...there should be a provision in the constitution empowering the president to address parliament and giving the members of parliament that power to question the president.¹¹⁹

These are situations that ultimately involve an element of pure bargaining in which each party is guided mainly by its expectations of what the other party will accept. But with each guided by expectations and knowing that the other is too, expectations become compounded. A bargain is struck when somebody makes a final, sufficient concession. Why does the other party concede? Because one party thinks the other will not. It was an untenable position for Mudge to accept an executive president as opposed to a ceremonial president because "the president must be above politics"¹²⁰. He asked: is the cabinet part of the executive or not? ...there must be no

¹¹⁸ *Ibid.*, 15 January 1990.

¹¹⁹ *Ibid.*, 15 January 1990.

¹²⁰ *Ibid.*, 15 January 1990.

misunderstanding whether the cabinet is part of the executive, he said. Whether the delegates tended to transform their position when they presented them as impartial views, as hypothesised by Elster, remains to be seen. In many instances, the hypocrisy of the speakers did not seem to affect their behaviour, and this seemed to be clearly understood by the other participants. The members of the committee indeed often talked in the name of their parties, not in their own individual capacities and they probably did so to avoid the opprobrium associated with the naked expression of their interests. But this did not prevent them, individually, from defending their own interests, and collectively from resorting to bargains as well as to deliberation.

Many types of negotiation include distributive elements, even when they are more complex. In other settings, unsophisticated negotiators tend to assume that all negotiation is distributive, and to miss cues that would allow both parties to come out of the deal with more. This is not what Gurirab had in mind. He continued to plead for the election of the president of the Republic by popular vote, because he believed, that the procedure is the most democratic. He said

...the head of state to sit at the same time in the Assembly contradicts, negates that separation of powers and will not support that for the reasons mentioned.¹²¹

The opposition parties wanted the president to be a member of parliament elected by parliament. But there was a legal problem with the proposal by the opposition. A legal advisor Prof. Wiechers advised that if the leader of the majority party or the leader of a coalition party becomes head of state or president, it means a qualification is added. It was true, he said, Pres. de Klerk was the leader of his party and he became president, but it was not by virtue of his leadership that he became president, but by virtue of his election at an electoral college.

So, if tomorrow Mr. de Klerk is not the head of the party; he won't be affected in his status as head of state. I just want to point out if you make a leadership party-political leadership the criterion, then you are complicating matters in the sense that that becomes a qualification and the day he isn't leader, are you

¹²¹ *Ibid.*, 15 January 1990.

going to say he loses head of state but he stays on and there is another leader of the party.¹²²

There is some range of alternative outcomes in which any point is better for both sides than no agreement at all. To insist on any such point is pure bargaining, since one always would take less rather than reach no agreement at all, and since one always can recede if retreat proves necessary to agreement. Yet if both parties are aware of the limits to this range, any outcome is a point from which at least one party would have been willing to retreat. Deep disagreements allowed, the chairperson became frustrated as a result of a lack of progress. He proposed to take the proposal to the House since voting at committee level was forbidden by the rules. He summed SWAPO's position as saying the president must be elected directly by the population and that was the bottom-line. Mrs. Ithana agreed with the chairman that a deadlock has been reached:

SWAPO, on its part, has been trying to propose ways of getting out, but I must say that our colleagues on the other side are not forthcoming. We propose this, they have objection, we propose that, they are not satisfied. They are not committed. If they were committed to something then we could follow it up and try to get solutions.¹²³

This position was shared by Hartmut Ruppel who thought that

...if we come to speak about material disputes it becomes very serious. I tried to understand and analyse the issues at stake and I find that what is beyond any dispute is that we have it in principle to have an executive president.¹²⁴

He argued that on the SWAPO-side

...we believe that it is a logical outflow of an executive president to be directly elected, and that he is then checked through various mechanisms provided for in the constitution. That is our principle point of departure and it has always been.¹²⁵

The basic principle underlying the realisation of joint gains from differences is to match what one side finds or expects to be relatively costless with what the other finds or expects to be most valuable and vice versa. There were many sources of differences between SWAPO on one hand and the opposition parties on the other.

¹²² *Ibid.*, 15 January 1990.

¹²³ *Ibid.*, 15 January 1990.

¹²⁴ *Ibid.*, 15 January 1990.

¹²⁵ *Ibid.*, 15 January 1990.

They traded off differences in form and substance, ideology and practice and outcome and reputation. When the parties differed in their expectations of future benefits contingency agreements were useful in the sense that in the end, a more watered down presidency was agreed to than what the opposition called a “run-away president”. SWAPO’s uncompromising stand was again stated by Theo-Ben Gurirab. He posited that the elections which were held in November 1989 clarified a number of things:

One clarity was the composition of the Constituent Assembly, the different majorities or, if you will, the representation of the political parties in the Assembly. As a result of that reality in the Constituent Assembly it is very clear to my mind that SWAPO is the majority party. So, we are not discussing for the purposes of the present Constituent Assembly a theoretical matter. The leader of that Party is Sam Nujoma. I have no difficulty whatsoever to deduce from that given the present realities in the Constituent Assembly, that the first president of the Republic of Namibia will be Comrade Sam Nujoma. Why am I saying that? I take it, talking to, distinguish-wise, members of the Constituent Assembly, as represented in the Standing Committee, joined now by distinguished lawyers, that the Constituent Assembly, as it is constituted now will be converted into the National Assembly of Namibia. So, every time that I talk I don’t want to be misunderstood that I am not talking about that. That is the given, the public know that. Equally it is so clear to me that Sam Nujoma’s reality as the leader of the majority party will be ratified by the converted Constituent Assembly. So, in the sense he will be elected by the National Assembly. So that issue to me is solved. So when I am intervening, I am talking about post 435-elections. My only problem is about membership of Sam Nujoma in the converted National Assembly and consequently as a member of the National Assembly, and as was the case with the Federal Convention; the next person in line will become the leader of the majority party in the Assembly. So, I have no problem with that aspect. My intervention has to do with post 435 – elections. For that we would want the elections to be by popular vote, and with that I would then ask to consider the provisions for the president, as stipulated here, and weigh them against that position.¹²⁶

¹²⁶ *Ibid.*, 15 January 1990.

After Gurirab's statement, there could be no doubt about what SWAPO desired. Katjiuongua addressed the committee that, indeed, a deadlock has been reached and proposed to table the matter to the full sitting of the constituent assembly for a public debate.

I think that is the easiest way to do it, because the way we are interpreting facts here differ materially. As far as I am concerned, the election we had in terms of 435 was to elect an assembly to write a constitution – period. Then, if we are going to convert this Assembly into anything else, it must be by understanding between the parties writing the constitution that we cannot have another election to convert this Assembly on the following understanding: I do not take it that the first person on the list of a political party automatically, because that party is the majority, becomes the President of Namibia and that should be seen that that person was directly elected. I cannot accept that, because it is just against the spirit of the whole Resolution 435 as I understand it, especially the 1982 Principles. So, I think if we can make a separate understanding as a transitional arrangement about the relationship between a president permanently in future elections it is a separate matter. As things stand right now either we accept the fact, as I see it, that the president elected by the Assembly will be a member of the Assembly, will sit in the Assembly and be accountable in the manner that we have pointed out here. If that is not acceptable to other people, then we are deadlocked, then I think we must go to the Assembly and clarify our positions.¹²⁷

Inspired by the classic advice to separate the people from the problem, Fisher and Ury (1981) differentiated between emotions that are directed toward a negotiator's offer and emotions that are directed toward the negotiator as a person to reconcile the seemingly contradictory findings concerning the effects of anger on negotiator concessions. SWAPO was not ready to be cowed into submission. Nahas Angula introduced a proposal so that the President of the Republic will be elected by universal and equal suffrage after every five years, save the first term of the president, who will be elected by the first National Assembly acting as the Electoral

¹²⁷ *Ibid.*, 15 January 1990.

College. The opposition seemed surprised and taken aback with the SWAPO proposal. Mudge stated as follows:

Let us, for God's sake, discuss this problem in a spirit of goodwill; let us make all of us feel confident about the future. I don't see any problems and I want to say this, our party will not object to a president being elected directly if we are sure and confident that there will be no abuse of power.¹²⁸

Not to be outdone, Hidipo Hamutenya weighed in:

Mr Chairman, we can't read the minds of the people, what they will do tomorrow or the day thereafter. We can only draft a constitution which, we hope, will work...Suspicion cannot be resolved here; it has nothing to do with what we are writing. If we are writing a constitution based on suspicion we will make no progress whatsoever.¹²⁹

The persuasion is accomplished by character whenever the remarks are held in such a way as to render the speaker worthy of credence. Hamutenya has always acted as a power broker within the assembly. As a result, he appeared credible among his colleagues and his audience formed a good impression of him that propositions put forward by him were acceptable. This was especially true in cases where there were vast differences.

The success of committees such as the drafting committee is influenced by the commitment of their members. Committees operate as a team whose members interact with each other through talk. As stated elsewhere, in a distributive bargaining process, only one side wins. This interpretation was clearly present during a discussion on the draft constitution that ministers must be confirmed by parliament. Dr. Tjiriange argued that if the president had the right to nominate his ministers, there was no need for the assembly to do so: "The freedom must be given to the president to bring these people without that proviso that they have to be confirmed by the assembly."¹³⁰ This was not exactly the line of thought Rukoro had:

I think suppose he appoints those three people to the cabinet from outside, then I think those three people should not be subject to confirmation just like the other members of the cabinet. But suppose he appoints the other three as people having these special skills, those three, the non-cabinet members, I

¹²⁸ *Ibid.*, 15 January 1990.

¹²⁹ *Ibid.*, 15 January 1990.

¹³⁰ *Ibid.*, 19 January 1990.

think should be subject to confirmation because based on the debate we had the last time, they being people with special expertise to benefit the proceedings in the assembly and some of the members have reservations about maybe these people would be appointed on a party-political basis or their skills or alleged skills will be questionable, then on that basis I think that the non-cabinet members should be subject to testing by the rest of the assembly as to their suitability.¹³¹

This view was shared by Staby who believed that the confirmation of the appointment of ministers by parliament was actually in the interest of the ministers themselves. He argued that given SWAPO's numerical strength, it was highly unlikely that the ministers would not be appointed. "So I fail to see the reservations or the resistance to the request that ministers be confirmed by parliament."¹³² The Chairman ruled that "we have already decided yesterday that they are not going to be confirmed by parliament."¹³³ Given these divisions, the final compromise had to aggregate a large array of interests and visions, and could not simply combine the basic preferences of major actors.

Essence of ultimatums

Claims-makers intend to persuade and they try to make their claims as persuasive as possible. Claims-making inevitably involves selecting from available arguments, placing the arguments chosen in some sequence and giving some arguments particular emphasis. These are rhetorical decisions. Moreover, as claims-makers assess the response to their claims or as they address new audiences, claims may be revised and reconstructed in hopes of making them more effective. In such cases, even the most ingenuous claims-maker must become conscious of doing rhetorical work. True, SWAPO was suspicious of the bicameral proposal. Dr. Tjitendero of SWAPO had in mind the Zimbabwe situation where the bicameral parliament remained a white elephant since that country's independence in 1980. He argued that the drafters should reflect on Namibia's conditions in order to build institutions that were not only relevant but would also promote the kind of values Namibia desired for the future. He did not see the justification for the creation of a

¹³¹ *Ibid.*, 19 January 1990.

¹³² *Ibid.*, 19 January 1990.

¹³³ *Ibid.*, 19 January 1990.

second House in relation to the national assembly. Nahas Angula of SWAPO was just as not convinced that the second house would serve national interest because he could not see

...how this house can restore what is perceived to be a national imbalance, because once you bring in people you still have to do it on the basis of numbers of people. So, we come back to what we have now in the Constituent Assembly...this particular proposal will add nothing to the kind of things we want to do for this country.¹³⁴

Persuasive communication is used to comfort the believers or annoy the opponent as a moment in a strategy. Richard Gregg (1967) argues that the role evidence plays in the discourse of advocacy is of major importance to anyone interested in argumentation. Standard treatises on argument emphasise the significance of evidence in the building of proof, suggest that the advocate begin his analysis by gathering and examining evidence and provide certain tests for judging the probity of evidential material. Underlying the concern for evidence is the assumption that rational decision-making requires a careful examination of all the data relevant to a proposition. Therefore an advocate is obligated to build his case upon a strong evidential foundation and those who analyse arguments must evaluate the credibility of the evidence presented. A corollary assumption seems to be that those arguments which employ sound evidence will be more effective than those which do not. At the Windhoek Assembly, it appeared that Katjiuongua was less successful in his task as could be read from Angula's treatment of the proposal as simply an attempt to

...impress people of other countries that we have a Bill of Rights in our constitution. It is a nice thing, but I am saying we should also start to address ourselves to the actual problems of our people...¹³⁵

It stands to be reasoned that expressing anger toward the situation would lead an opponent to make large concessions, as can be predicted on the basis of a strategic decision-making perspective. But on the other hand, Van Kleef *et al.* contend, directing anger toward the person may produce a quite different effect. When the anger is directed toward the person instead of their offer, in a sense it loses some of its informative qualities. Public officials have an obligation to offer good reasons for the exercise of social and political power. But given the fact of reasonable pluralism,

¹³⁴ *Ibid.*, 18 December 1989.

¹³⁵ *Ibid.*, 18 December 1989.

the resources for inventing those reasons seem to be lacking as could be seen from Rukoro's argument in support of a bi-cameral parliament:

there was a need to prevent precipitate action, legislative or otherwise, by the lower house...who can sit down and say 'here you were right' here it was an over-hasty consideration or decision; please have a second look at this thing'...But if we are going to have a perpetuation of that, whereas one guy said...'Look here, we had this election sealed up, the DTA was running very strongly and we were confronted by the "border of Oshivelo", meaning, in tribal terms obviously, that we will have a situation where one particular region in this country for generations to come, not will, but may decide the national affairs in this country. What type of implications...this hold for us a nation, for our political stability?'¹³⁶

Accounts of practical reason have become increasingly important for political philosophers seeking to theorise the regulative principles governing democratic deliberation. Aristotle (1991) believed that rhetors must arrange the arguments carefully in order to fit the situation. Whether by design or accident, members of the Windhoek Assembly could not escape Aristotle's view that rhetoric is instructive and is a means to win arguments. Rukoro based his arguments on the lexicon of conflict – employing words such as “confronted” and “political stability” – to arouse emotions that are associated with anger and resentment. These emotions then evoke strong feelings of antipathy towards an entity which they identify as “the enemy”. Power determines whether negotiators will adopt a strategic route and consider the strategic implications of a counterpart's anger or whether they have the necessity of adopting an emotional route. The perceived justifiability of the opponent's anger determines to what extent negotiators who adopt the emotional route feel inclined to retaliate, with unjustifiable anger producing stronger retaliation desires than justifiable anger. Indeed, Rukoro's arguments served only to unite SWAPO delegates against what they saw as attempts by the minority parties to neutralise SWAPO's electoral gains. In the words of Angula, Rukoro

¹³⁶ *Ibid.*, 18 December 1989.

...was against putting in things in the constitution which could be read by other people to be against them,...then I am not quite sure whether we are creating a good atmosphere for people to accept this.¹³⁷

Angula continued to state reasons of his rejection of the proposal. The strategy or act of reason giving created or gave to Angula a pragmatic reason for holding the standpoint. Emotional flooding poses obvious hazards to negotiators who need to be able to think clearly when faced with the complex, strategically demanding task of creating and claiming value. For this reason, emotional regulation can be an essential component of negotiation. But different types of regulation create different results. Expressing positive emotions may increase the willingness of your counterpart to agree to your proposals and to view you and the situation in a better light. While putting your counterpart in a good mood is a useful strategy, it often can seem like an impossible goal.

The consequences of policy change stand to make the conflict even more apparent. Thus, the framing of the issue can therefore be pivotal in making a case in favour of or against competing values. Moses Katjiuongua seemed to have been infuriated by Angula's response. He called upon his oratory skills to draw on life images to convey very strong and potent political evaluations:

With all due respect for that, I would also like to appeal that the brotherly, comradely spirit here should not prevent us from talking frankly...It is no attempt to spoil the spirit here...I think I am not here to plead for any suspicion about motives, because I am not hiding what I am saying. I am telling you straight what I feel...because suspicion by definition can cut two ways. If you suspect me of something, by definition I also suspect... you are trying...certain things. I think that is not productive. I prefer us to differ because we hold different views about certain problems. I would not like us to differ because of misunderstanding or because of not listening to each other or to differ because of ignorance. So, Mr. Chairman, I know my SWAPO brothers and sisters are experienced people...hard negotiators; they want to lose at nothing...I think they must also have a similar respect for us. So far...we have accepted your institutions as proposed: executive president, prime minister and many of the institutional proposals you have made. We

¹³⁷ *Ibid.*, 18 December 1989.

feel that in the spirit of give and take, why not? After all it is in our common interest...But I think equally should not try to make what we are saying look ridiculous or that we trying to smuggle rotten things through the backdoor, because that is not fair. I think we may differ on these things and I wouldn't like to refer to the type of discussion we are having here on the floor of the Assembly...But if you say that you cannot even contemplate agreeing to this type of proposal, then I wouldn't want to have a feeling that you only want to take, you don't want to give. Thank you.¹³⁸

In the case of a negotiation, there is a greater expectation on the part of both parties that threats may be used should resolution of a conflict reach impasse. It was clear that the disagreements were wide and stood to spoil the prevailing good atmosphere. Katjuongua wanted SWAPO to commit to a bicameral chamber proposal as a matter of principle. What he wanted

...is the acceptance in no uncertain terms that...as part of our future constitutional system...we envisage a two chamber parliament...My acceptance and my support of all the things that I have supported here are significantly contingent upon agreement that is also part of that particular future we are talking about.¹³⁹

Walton (1988) states that, "One of the most trenchant and fundamental criticisms of reasoned dialogue as a method of arriving at a conclusion is that argument on a controversial issue can go on and on, back and forth, without a decisive conclusion ever being determined by the argument. The only defense against this criticism lies in the use of the concept of the burden of proof within reasoned dialogue. Once a burden of proof is set externally, then it can be determined, after a finite number of moves in the dialogue, whether the burden has been met or not. Only by this device can we forestall an argument from going on indefinitely, and thereby arrive at a definite conclusion for or against the thesis at issue" (p. 251).

Katjuongua continued to issue threats. But, as Schelling (1956) wrote, the threat's efficacy depends on the credulity of the other party and the threat is ineffectual unless the one who threatens can rearrange or display his own incentives so as to demonstrate that he would, *ex post*, have an incentive to carry it out. Clearly, Katjuongua was not in a position to effect demands given his numerical strength in

¹³⁸ *Ibid.*, 18 December 1989.

¹³⁹ *Ibid.*, 18 December 1989.

the assembly – he being the only delegate. How, then, could he commit himself to an act that he would in fact prefer not to carry out? Perhaps he bluffed in order to persuade SWAPO that the costs to not reaching an agreement were higher. It is not clear what Katjiuongua would have done had his threats not been met. Nevertheless, this is an *ad baculum* argument because of the threat Katjiuongua's argument is meant to arouse in his audience.

Katjiuongua found solace in Hamutenya's conciliatory submission that while there was an emerging consensus, there was no agreement yet. SWAPO had difficulties in accepting the proposal because there was no "logical and convincing argument"¹⁴⁰ that has been advanced by Katjiuongua. Other members of the drafting committee weighed in¹⁴¹:

Dr. Tjiriange: It is a bit unfortunate that the honourable member is giving us such a condition that we have to ...

Member: No conditions.

Dr. Tjiriange: If there is no condition, then I cannot agree to agree on this in uncertain terms, as it was put. I think we have to have enough time to get what has been requested and we can then make up our minds. I have not yet agreed, because I don't know what to agree on. My questions have not even been answered. I will not maybe have any insurmountable problems after I am convinced, but at this moment I am not. So, why should I be driven into agreeing if I am not yet clear on what I am to agree on?¹⁴²

Van Eemeren and Grootendorst (2003) pursue the argument that, "The discussant who is challenged by the other discussant to defend the standpoint that he has put forward in the confrontation stage is always obliged to accept this challenge, unless the other discussant is not prepared to accept any shared premises and discussion rules; the discussant remains obliged to defend the standpoint as long as he does not retract it and as long as he has not successfully defended it against the other discussant on the basis of the agreed premises and discussion rules" (139). The participants themselves will determine the reasonableness of the interlocutor's moves and they do so by applying their own standards. Angula opined that "...it will

¹⁴⁰ *Ibid.*, 18 December 1989.

¹⁴¹ *Ibid.*, 18 December 1989.

¹⁴² *Ibid.*, 18 December 1989.

not be good for us to dictate to each other - that it is either this or that"¹⁴³. No one likes to be told what to do. When someone makes a take-it-or-leave-it demand or tells you how to behave, he is limiting your freedom to decide and act as you see fit. Romer-Rosenthal theory of veto threats of ultimatum bargaining in political settings posits that a party that proposes makes a single, final, take-it-or-leave-it offer to a another party. In this case, a threat serves different functions in that political rhetoric boxes the speaker so he cannot retreat from his position without paying a steep price. The speaker's commitment then alters the subsequent behaviour of opponents (Thomas and Rosenthal 1978). Katjuongua wanted a definite commitment from SWAPO on future support on other areas of dispute which SWAPO wanted agreement on. He was fully aware that SWAPO wanted to reach consensus on the constitution as soon as possible in order for Namibia to gain independence. According to Geingob (2004) opposition parties believed that under proportional representation, with the whole of Namibia as one constituency, SWAPO would continue to secure a majority in the National Assembly for years to come. However, if a second house were created with equal representation from various regions, with elections based on a constituency system, SWAPO would fail to gain a majority in the second house. In Paris, on the other hand, the principle of bicameralism was rejected after debate. However, with the later addition of a senate to the legislature, France today has a bicameral parliament. Bicameralism was adopted in Namibia, a unitary state, in the spirit of compromise by SWAPO.

Conclusion

The distributive bargaining situation demonstrates that when only one policy dimension is bargained, deadlocks can only be broken if the reluctant political parties obtain side deals that buy their consent. The unanimity voting rule enhances the bargaining power of each party. This feature explains why the costs of reaching agreement under unanimity can be extremely high. This finding illustrates that there are some ways in which the unanimity or joint-decision trap can be overcome, although unanimity requirements in multiparty negotiating situations do present many obvious difficulties. Although there were tendencies at the Windhoek Assembly to focus on parties' preferences, this chapter tried to show that rhetoric in bargaining

¹⁴³ *Ibid.*, 18 December 1989.

situations is critical. Consequently, we should not underestimate the impact that the type of bargaining situation will have on outcomes.

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CHAPTER THREE

RHETORIC OF COMPROMISE

The Chairman said the first day when he became chairman that this was a process of give and take. Now I think I have been giving...and I don't want the people to break their part of the deal. I have been giving and so far I have scored no point. So really, brothers and sisters, I must also report something back home. So, I take it here you will not die if you do not compromise.

Moses Katjuongua, 1989

Introduction

The previous chapter dealt with distributive bargaining, where one party gives up something in exchange for another in the course of deliberation. As the delegates at the Windhoek Assembly met to draw a constitution for Namibia, they had to resolve constitutional options and differences. This chapter investigates compromise as a concept of finding agreement through a mutual acceptance of terms often involving variations from an original goal or desire. The chapter also deals with determining whether or not members of the drafting committee compromised as a result of the content and rhetoric of their negotiations by investigating how specific agreements were reached through classical exchanges of concessions. The chapter further investigates whether compromise, as an object of negotiations, was desirable at all and how it helped or hindered negotiations at the Windhoek Assembly.

The art of compromise

Politics is commonly called the "art of compromise." This label is especially appropriate for democratic politics. Elected officials, representing different voters, meet in legislative chambers to hammer out policies that all constituents can live with. Of course, no politicians receive everything they want in the final legislative package: the need to assemble at least a simple majority to implement any policy almost invariably means that supporters of some policy must sacrifice something of value to others active in the political process. Politicians unwilling to compromise are typically labelled ideologues - a label not regarded as a badge of honour among members of the political class. Successful politicians early on learn the survival value of compromise. Economist Donald Wittman (1995: 154) correctly observes, "That is what good politicians do: create coalitions and find acceptable compromises."

Political philosopher Jean Bethke Elshtain (1995: 61) is almost rhapsodic about democratic compromise: "But compromise is not a mediocre way to do politics; it is an adventure, the *only* way to do democratic politics."

Deliberation is, thus, key to compromise. Only through deliberation do negotiators discover each other's needs. The concept of public deliberation emerges from democratic deliberative theory. According to Chambers (2003), democratic deliberative theory begins with a turning away from liberal individualist or economic understandings of democracy and toward a view anchored in conceptions of accountability and discussion. Talk-centric democratic theory replaces voting-centric democratic theory. Voting-centric views see democracy as the arena in which fixed preferences and interests compete via fair mechanisms of aggregation. In contrast, deliberative democracy focuses on the communicative processes of opinion and will formation that precedes voting. Accountability replaces consent as the conceptual core of legitimacy. A legitimate political order is one that could be justified to all those living under its laws. Thus, accountability is primarily understood in terms of "giving an account" of something; that is, publicly articulating, explaining and most importantly justifying public policy. Consent does not disappear. Rather, it is given a more complex and richer interpretation in the deliberative model than in the aggregative model. Although theorists of deliberative democracy vary as to how critical they are of existing representative institutions, deliberative democracy is not usually thought of as an alternative to representative democracy. It is rather an expansion of representative democracy.

The sustained and even growing interest in public deliberation is premised on a number of reasonable but largely untested assumptions. According to Mendelberg (2002), if it is appropriately empathetic, egalitarian, open-minded and reason-centred, deliberation is expected to produce a variety of positive democratic outcomes (Barber 1984; Chambers 1996 and Sunstein 1993). Citizens will become more engaged and active in civic affairs (Barber 1984). Tolerance for opposing points of view will increase (Gutmann & Thompson 1996). Citizens will improve their understanding of their own preferences and be able to justify those preferences with better arguments (Chambers 1996; Gutmann & Thompson 1996). People in conflict will set aside their adversarial, win-lose approach and understand that their fate is linked with the fate of the other, that although their social identities conflict they "are tied to each other in a common recognition of their interdependence" (Chambers

1996). Faith in the democratic process will be enhanced as people who deliberate become empowered and feel that their government truly is “of the people” (Fishkin 1995). Political decisions will become more considered and informed by relevant reasons and evidence (Chambers 1996). The community's social capital will increase as people bring deliberation to their civic activities (Fishkin 1995 and Putnam 2000). The legitimacy of the constitutional order will grow because people have a say in and an understanding of that order (Chambers 1996; Gutmann & Thompson 1996).

In fact, politics stymies more beneficial compromise than it promotes. Labelling politics as the art of compromise makes sense only if politics is compared with the breadth and depth of compromise occurring in other institutional settings. Such a comparison shows that politics does *not* excel at compromise, even if voters put no ideological restraints on the ability of politicians to logroll. While all parties sidling up to the political bargaining table must compromise amongst themselves, only a relatively small handful of interested parties ever get seats at this table (Gwartney and Wagner 1988). To make a final argument on this point: politics is weak at compromise not only because voters vote excessively ideologically, but also because politics artificially and unnecessarily limits the number of bargaining parties (Crew and Twight 1990; Twight 1994). Thus, parties excluded from the political bargaining table never have their interests on the table to be weighed against the interests of the select few sitting at the table.

Those who make choices about objectives in negotiation often assume that a limited array of outcomes is possible. So those who see a negotiation as an opportunity to “win” or maximise one “side’s” gain, assume scarce resources which must be allocated. Compromise, then, necessarily becomes desirable. While many have criticised those who compromise, especially “unprincipled” politicians, Machiavelli (1998), at least, has argued that the leader sometimes must compromise if he is to hold the whole (and conflicting) polity together. And Edmund Burke, consummate politician, observed that “all government...every virtue and every prudent act is founded on compromise and barter” (1977: 130-131). By finding “golden means” or agreeable, if not optimal, solutions to contested problems, politicians, like negotiators, make things happen, keep the peace, and often also keep some rough accounting of just deserts for the next time around. And in better

case scenarios, negotiators can actually solve problems and get parties just what they need.

The willingness to compromise is praised as the mark of the reasonable person. Conversely the refusal to compromise seems to be one of the most important marks of the person who is outside of normal politics. This emphasis on compromise in politics is reflected in political science. We are told, for example, that "...a political system is above all, a mechanism for the making of decisions...Decisions involve compromise among many conflicting points of view held by social groups, parties, associations, interest organizations, and regions" (Macridis and Brown 1964). As an illustration, there was general agreement between the framers of the Constitution at Windhoek that executive power should not be unchecked. There were, however, differing views on how these powers could be subjected to oversight. DTA had argued that providing for a constitutional head of state would be in line with the Westminster type of democracy. As stated elsewhere, it was interesting that they opposed executive presidency despite the fact that in South Africa, with whom DTA had longstanding relations, there was an executive state president. Concern was also expressed that executive presidencies in Africa were not on the whole successful. SWAPO, on the other hand, viewed the African experience in a different light. Proposing a compromise, Nahas Angula stated as follows:

...I listened to the arguments and I attempted to ascertain that we will not have a run-away president because the constitution will not allow it to do so. Here I would like to draw the attention to the provisions made to very seriously curb the functions and the powers of the president. In article 28(6) the president can be impeached if he tries to run away from his responsibilities. That is provided for. In 28(5) the term of office of the president is prescribed as ten years. However popular this person might be to the people, the people will only be able to elect this person two times. In article 31, the powers of the president is very limited in terms of what he can appoint and who he cannot appoint by himself without control by the national assembly. Article 31(7) is about reviewing, reversing and correcting. Again, here the functions of the president are strictly monitored by the national assembly so that the assembly will be in a position to review, reverse and correct those actions and activities of the president. Article 38: Here we have the situation whereby the national

assembly can actually impeach a member of the president's cabinet which will be a reflection on the president himself. Then we come to article 40. This one is about accountability. Again here, we see that the national assembly will have power to ensure that the ministers, individually and collectively, are accountable to the national assembly, otherwise the action to monitor or to investigate their activities can be re-instated. So, in these chapters on the executive we have severely restricted the activities of the president. If you add to these provisions made in the chapter dealing with fundamental human rights and freedoms and you add to this the judiciary as a watchdog to make sure that the constitution is adhered to, and many others which I don't want to state here, you see that the powers of the president are very much restricted. You cannot under any circumstances have a run-away president... This is my submission and I am coming back to the proposal I made yesterday that the president should therefore be elected by universal suffrage, save the first one.¹⁴⁴

The concept of compromise was the basis for Windhoek delegates' understanding of the process by which political disputes were settled. They also believed that given sufficient discussion, free from partisanship, the right solution to a dispute could be discovered. A dialectical process is envisaged in which, as Aristotle explains, through pitting an antithesis against a generally received opinion, men are able to discern the truth and falsehood in both. Mutual correction is achieved as each side raises difficulties to the other's argument. To compromise would truncate the necessary discussion short of reaching the truest answer possible, and thus risk a false or at least an unnecessarily uncertain, answer.

One way in which democratic participation in politics can generate compromise is by altering preferences. As individuals meet and deliberate, they come to understand each other's viewpoints, develop empathy, recognise the value of moderation, internalise the common interest and de-emphasise narrow self-interest. This is an old theme in democratic theory. One of the merits of democratic participation, wrote John Stuart Mill (1946), is that the citizen is called upon, while so engaged, to weigh interests not his own; to be guided, in case of conflicting claims, by another rule than his private partialities; to apply, at every turn, principles and

¹⁴⁴ Windhoek Constituent Assembly, *Hansard of the Standing Committee on Standing Rules and Orders and Internal Arrangements*, 19 January 1990

maxims which have for their reason of existence the common good. ... He is made to feel himself one of the public and whatever is for their benefit to be for his benefit. In this view, democracy induces cooperation and compromise not by changing the constraints we face, but by changing the type of people we are. Democracy makes us less selfish and more public-spirited. This view can be best understood by citing the response by Mudge to Angula's submission:

I just want to get clarity in my mind. Mr. Angula has now emphasised that we have, according to him "severely restricted powers of the president". To prevent him from and I quote, it is not my word or my formulation "being a run-away president". What has the election of the president got to do with that in any case, whether he is directly elected or whether he is elected by parliament? Can anybody tell me how will that influence the powers of the president and the accountability of the president? If I can get clarity on that I will be able to...¹⁴⁵

The inevitability of compromise says nothing about the desirability of compromise in general and nothing about the desirability of making particular compromises in specific situations. Since compromise can lead just as surely to individual degeneration and social decay as it can to individual growth and social progress, it is essential that we have some standards with which to measure the limits of what, in specific situations, can be safely conceded. The principle of compromise, as a self-sufficient principle, cannot supply that standard. If there is any virtue in making concessions, that virtue inheres not in the technique of compromise but in what is accomplished by that technique. The substance of compromise, therefore, is more important than the procedure.

Compromise as the animating and self-sufficient principle of politics can lead eventually only to the elimination of politics as mediation. If anything can be done so long as it is done by mediation and compromise, what is to prevent the stronger groups in society from demanding more and more concessions from the weaker? How can the weaker interests refuse to grant more and more concessions to give up eventually their interests entirely, particularly if they cannot properly question the legitimacy of any of the proposals made by the stronger interests, appeal to the conscience of the stronger interest or appeal to the sense of justice of the community

¹⁴⁵ *Ibid.*, 19 January 1990.

at large? SWAPO was well aware of the importance of making far-reaching concessions if they had to win over opposition parties. It seemed that Angula's submission was not enough to satisfy the smaller parties. Hartmut Ruppel tabled what he called "an elaborate compromise package":

1. The Executive power shall vest in the Cabinet of Ministers, which will be headed by the President.
2. The President will, as we have discussed before, exercise his functions in terms of the constitution in consultation with members of the Cabinet.
3. The President can be removed from his high office on the grounds that he has been guilty of a violation of the constitution or serious violation of the laws of the land or gross misconduct or inaptitude, which would in the view of at least a two-thirds majority of the house (legislature) render him unfit to hold with dignity and honour his high office. That is basically the impeachment, the provision provides for a two-thirds majority of the house.
4. The President can also be removed as soon as he fails to qualify for being the president in the first place. He must meet certain qualifications to be able to be a candidate for presidency. If he during his term of office loses one of the qualifications, he is out of office.
5. There is a provision that the acts of the president, any action taken by him, pursuant to the powers vested in him can be reviewed, reversed or corrected if it is deemed necessary or appropriate by at least a two-thirds majority of the legislature and two-thirds of the Cabinet.
6. Appointments by the executive President shall be valid but could, similarly, be challenged by the same procedure as I have described a moment ago.
7. The President is empowered to terminate the services of any minister, but again this decision is subject to the same review, procedures as I have been referring to in respect of the previous - two kinds of actions.
8. The president will have no choice but to terminate an appointment to the cabinet if the legislature with a simple majority brings out a vote of no confidence against a particular minister.
9. If a bill is passed by the legislature with a two-thirds majority and passed on the President for signature, he will have to sign the bill. He cannot decline to do so.

10. If the bill is passed with less than two-thirds majority, the president may decline to sign the bill and he must then send the bill back to the legislature, which body may then decide to once again refer to the president. If he once again declines to sign, he must dissolve both the legislature and his own office and call for elections. It is basically if there is a deadlock between the ruling party-president.
11. The legislature shall be dissolved, new elections called, if the president is advised to do so by his Prime Minister, acting in concurrence with the majority of the Cabinet, and that would then also mean that the president is up for elections again.
12. If he decides to withhold his assent to a bill on the grounds that he regards it as being unconstitutional, he can be overruled by the constitutional Court, and the court's ruling will be binding on the President. That is if as far as the checks are concerned and with that I want to conclude.¹⁴⁶

By finding agreeable solutions to contested problems, negotiators make things happen and keep the peace. And in better case scenarios, negotiators can actually solve problems and get parties just what they need. Thus, the solutions that bargaining and negotiation produce, through a process of engagement, consent and decision, by giving something to everyone, may have greater participation, legitimacy and longevity than other ways of doing business. Jon Elster (1995), in a study of comparative constitutional processes, noted that the "second best" form of secret, committee-based, bargaining that produced the American constitution, filled with compromises, has been more robust than the more open, principled, and plenary forms of decision-making that formed the first French constitution.

As the drafting of the Namibian constitution demonstrated, the complexity of managing multiple stakeholders with some conflicting and some complementary interests required processes that allowed trades (where parties exchange agreements, for instance delegates agreed to accept an executive presidency in exchange for a bicameral parliament); joint fact finding (where parties work together to arrive a solution such as the groundbreaking decision by the delegates to jointly engage outside lawyers to draft the constitution in legal terms) and contingent agreements (agreements reached pending further agreements – especially with

¹⁴⁶ *Ibid.*, 14 December 1989.

regard to how the parties agreed to the president appointing judges provided he did so at the recommendation of an impartial body). Susskind (2000) observes that although freighted with its own ethical dilemmas, the negotiation of multi-party disputes permits both instrumentally satisfying and more ethical processes and outcomes to be utilised. More people participate, and instead of looking for majority votes, parties seek solutions that satisfy as many needs as possible, without making any party necessarily worse off. This facilitated negotiation or “consensus building” is intended to improve on what conventional processes of voting and strategic behaviour usually produce. The method of persuasion need to be considered here: The two disputants in immediate conflict came together by themselves to consider their difficulties. It is assumed that, with goodwill and the use of reason, truth in the matter of value conflicts may be discovered. One of the disputants was persuaded that their position was better than the opponent’s. On the other hand, SWAPO was persuaded that the opponent’s position was wrong. In a case of this kind something quite different from compromise took place. Neither side had made any concessions; neither had lost anything. They both arrived at a position that was acceptable to all. Thus, the method of persuasion has its presuppositions. It assumes that through the use of reason objective truth in the matter of values and principles, together with particular exemplifications of these, can in general be determined and that the disputants have goodwill and honestly seek the truth before all else. Obviously, in any particular case, the method of persuasion is inefficacious if its presuppositions are not satisfied in fact.

During a debate on citizenship on 8 December 1989, a material dispute arose as to whether naturalised citizenship should be granted after an applicant has been resident in Namibia after 5 or 10 years. Mr. Mudge arguing in favour of five years said

I really think it s unfair. If it is only a matter of a person being here for five years and one month, but if he has been here for nine years, somebody who has devoted his life to this country for nine solid years, I think it is unfair to exclude him.¹⁴⁷

Rukoro offered a compromise: “I have no big problems with five years as a compromise in exchange for a concession from Mr. Mudge on some other

¹⁴⁷ *Ibid.*, 8 December 1989.

aspect".¹⁴⁸ Mr. Barney Barnes of the DTA wanted clarity: "is the honourable member horse-trading?"¹⁴⁹ In the method of persuasion, when incompatible ends, principles or objects are willed by two disputants, the function of reason is that of being a critic of the values willed. Each disputant transcends himself, becomes a critic of his own will, on the supposition that, since there is objective truth in such matters, there is the possibility that one or the other or both of them are wrong. However, the method of compromise is necessary because oftentimes disputants lack goodwill (a term referring to making correct decisions in reference to other people) and will not allow reason to lead them to truth. Hence, in compromise reason is appealed to not to reach a new or fuller truth but to alleviate the effects of bad will.

The recognition of the exact distinction between the method of persuasion and the method of compromise is important because all too often they are confused and compromise is identified with persuasion. However, as explained above, even though certain examples of the method of persuasion may have the form of compromise, they lack the essential factors that define the method of compromise. In literature, the terms "persuasion" and "compromise" are often used interchangeably as having the same meaning. Just as the method of persuasion sometimes has the form of compromise, but lacks its substance, so the method of compromise may produce a similar illusion. The difference lies in the function of reason in the two cases. As this has already been discussed, it will suffice here to point out that in the method of persuasion, disputants yield because of insight into a new or fuller truth discovered through reason. In compromise, they yield because each feels that it is more reasonable to lose a little than run the risk of losing all. The form is that of persuasion, but the substance is that of compromise.

Persuasion as a social heuristic

As the Constituent Assembly turned its attention to working out details about the nature of the legislature, some of the concerns of the members of the assembly were to bring about accountability and establish a system of checks and balances. However, at the same time, one could see that the reasoning behind non-SWAPO parties arguing for a bicameral parliament was informed not just by their desire to enhance accountability. They believed that under proportional representation, with

¹⁴⁸ *Ibid.*, 8 December 1989.

¹⁴⁹ *Ibid.*, 8 December 1989.

the whole of Namibia as one constituency, SWAPO would continue to secure a majority in the National Assembly for years to come. However, if a second house were created with equal representation from various regions, with elections based on a constituency system, SWAPO would fail to gain a majority in the second house. Non-SWAPO parties' thinking was based on the belief that the composition of regions would remain the same as that prevailing in the pre-independence era irrespective of their population sizes. As SWAPO's power base was perceived to be restricted to one northern region where most of the Oshiwambo speaking people lived, non-SWAPO parties felt that they stood a good chance of controlling the second house as they could gain majorities in many other regions (Geingob 2004). Moses Katjiuongua directly sought SWAPO to compromise:

The Chairman said the first day when he became chairman that this was a process of give and take. Now I think I have been giving ...LAUGHTER...and I don't want the people to break their part of the deal. I have been giving and so far I have scored no point. So really, brothers and sisters, I must also report something back home. So, I take it here you will not die if you do not compromise.¹⁵⁰

Katjiuongua wanted SWAPO to compromise on the grounds that he has compromised enough. He wanted to appeal to the emotion of pity. Is there something wrong with attempting to arouse the emotion of pity in others when they do not already feel it themselves? A question remains as to whether appeals to pity be rejected because any emotion is inimical to clear thinking and is simply irrelevant to the justification of action. Katjiuongua knew it may not be enough to rely for appeal to emotion in argument:

...I just want to discuss the principle. I simply want to repeat what I said in the Assembly and I believe in that sincerely, I think it is the only practical and conducive manner to build a healthy nation, it so provide mechanisms by which all of us, in bigger or smaller numbers, feel that we are part of the same process, we are making decisions this or the other way, but at the end of the day we all have institutional inputs in what this country will look like. That is one reason why I feel strongly that we must have a bicameral legislature. That is one important reason. Therefore I am a proponent – and I want to leave no

¹⁵⁰ *Ibid.*, 19 December 1989.

in doubt that I feel we should a bicameral legislature. After this Assembly of ours has run its time out, at the end of it we should have in future a bicameral legislature and I said in my proposition that the numbers could be trimmed down to make the whole exercise cost effective. So, I am not looking for having institutions all over the place. Apart from the fact that I feel in the context of Namibia, an institution of that nature is necessary, I also feel for a number of other reasons that we have checks and balances, so that we make sure that our country always makes the best decisions in the world...I am not saying our president will do that, I am saying that here we are talking about institutions that will shape people and somehow make sure that they behave in a certain way.¹⁵¹

It is clear from the statements by Katjiuongua that he was motivated, partly by his fear of what the new government would do or not do. Thus, it was in his interest to somehow curtail the powers of the executive. Fear is an influential emotion whose history reveals its impact not only on individuals, but on entire nation. Fear has been particularly important politically and the history of republics reveals a political discourse rife with appeals to fear. Scholars have shown that emotions can alter the bases of political decision-making, influence the desire to seek information and trigger political action. Fear is often described as a wild emotion that endangers both social order and the possibility of constructive political dialogue. On 11 December 1989, during a heated proposal by the Administrator General to privatise certain schools for whites, many black delegates opposed the proposal on the grounds that no separate schools for whites and blacks will be tolerated in an independent Namibia. Mudge weighed in:

I want to make one thing clear which seems to been overlooked. The problem that we have the whole idea of privatising schools is not that we consider this only to affect black people. The pupils and parents of many towns and villages are terribly concerned about this whole thing because it will affect the other fifty schools. What is going to happen to the other fifty schools if the top-class students and more wealth parents send their children to the private schools? Those schools will definitely not be able to accommodate all the children. So, not all white pupils are going to benefit from this, and for that reason my party

¹⁵¹ *Ibid.*, 19 December 1989.

and the white members of the DTA are very much opposed to the privatization of school buildings, and I think we will want to have the opportunity to express our concern. The impression must not be created that...only black people who are opposed to the privatization. There are hundreds of white people who are opposed to that, because this is going to be a sort of “rykmans-apartheid.” The more wealthy people and the clever children will go to private schools and the other pupils from Outjo, Otavi, Omaruru, Usakos, Mariental, and all those other places will find themselves in a very difficult position...I would want to know what is going to happen now. Is the AG going to go ahead or is he prepared to wait?¹⁵²

And yet, fear is an indispensable political emotion. For, without angry speech, the body politic would lack the voice of the powerless to question the justice of the dominant order. As Lyman (2004) observes, “A dialogical politics can only emerge when fear is heard with empathy rather than domesticated or silenced” (133). Political deliberation is a social practice in which citizens communicate with each other about how they should direct the actions of their political communities. As such, it has two basic elements: some form of public reasoning; some way in which citizens exchange their views about matters of common interest and an opportunity to consider together this exchange of opinion and argument in reaching decisions about which collective action to support. “But the discourse of fear has animated a great deal of controversy and debate that reveals a recurring uneasiness and uncertainty among scholars, citizens and policymakers about the compatibility of this emotional state with effective political deliberation and policy making”, Pfau 2007: 216). That debate is for another time. But from the perspective of the philosopher and informal logician, appeals to fear have been regarded as fallacious, as attempts by immoral rhetors to sidestep the standards of logic and reason in order to manipulate their audiences. Katjiuongua went on to make his case:

...I think there is a dire necessity to have a bicameral legislation. I am talking about basic principles. I think the technicalities can be left out for the time-being. Whether you call that a National Assembly and the other one you call a Senate- I am not very much for the idea of calling it a Senate, a Senate is more abstract, it is a bit more foreign. The feeling is one of a nation. So, I

¹⁵² *Ibid.*, 11 December 1989.

would prefer a national council or something like that and a house of deputies, who represent people. A national assembly seems to be an all...institution. It sounds like a parliament. That is why I think you call it a “Staatsraad” or National Council or something like that. But the terminology is not so important for me.¹⁵³

Appeal to fear argument is used here to mean a specific type of argument that cites some possible outcome that is fearful to the target audience. In order to get that audience to take a recommended course of action by arguing that in order to avoid the fearful outcome, the audience should take the recommended course of action. In this respect, the fear appeal possesses a conditional structure and operates according to the logic of dichotomisation in which the fear appeal argument sharply divides the respondent's available options into two mutually exclusive actions in which the only way you can avoid this very fearful outcome is to take the recommended action.

In order to understand and model what are normally referred to as “emotions” in humans and other animals, there is a need to start from a deeper analysis of the concepts we are aiming to instantiate (Sloman 2001). This task is made difficult by the fact that we do not all agree in our usage of the word “emotion”. For example, some will call *surprise* an emotion whereas others (Ortony *et al.* 1988) will say that it is just a cognitive state in which an expectation has been violated, as often happens in a complex and dynamic world and can even occur when doing mathematics. Of course, surprise, like any other state, can trigger states that most people would call emotions. There are also disagreements over whether pains and pleasures are emotions, some regarding it as obvious that they are, whereas others find it equally obvious that one can have the pain of a pin-prick or the pleasure of eating an ice cream without feeling at all emotional about it. Another example: some people believe that emotions, by definition, cannot exist without being experienced, whereas others regard it as obvious that someone can be angry or infatuated (and therefore in an emotional state) without being aware of their state, even if friends notice it. On further investigation, this dispute can sometimes turn on whether an emotion's being experienced is taken to imply that the emotion is recognised and labelled as such or only to imply that it involves being aware of some mental states and processes

¹⁵³ *Ibid.*, 19 December 1989.

related to the emotion. At one extreme, a theorist will say that you cannot enjoy something unless you recognise and categorise your state as enjoyment. An intermediate position would claim that there must be some experience that you recognise and categorise which is part of the enjoyment, even if the total state is not recognised.

Katjiuongua knew that he must not only appeal to reason and emotion. He recognised that unless he did that, SWAPO would not move from their bottom line. In the *Rhetoric*, Aristotle (1991) makes clear that fear is connected to regime preservation precisely by way of collective perception and deliberation. Fear makes people inclined to deliberation. Such a statement seems highly questionable from the perspective of those Platonists and traditionalists who tend to juxtapose emotion and reason, but makes sense within Aristotle's "cognitive theory of emotions" (Morreall 1993: 359). According to this tradition, some emotional states necessarily entail a cognitive component - one must have particular beliefs or perceive events in particular ways, in order to experience the emotion. Not all emotions possess such a cognitive dimension, but the cognitive nature of Aristotle's account of fear is evident in his definition of fear as "a sort of pain or agitation derived from the imagination of a future destructive or painful evil" (1991: 139).

If the democratic method be identified completely with the method of compromise, the following implications may be drawn. Human nature being what it is, persuasion with its normative use of reason, cannot be depended on as workable. Conflicts between groups of individuals cannot be resolved with a total gain for all parties concerned. Rather, each loses something and gains only in the negative sense of not losing all. Also, it follows directly from the meaning of compromise that no disputant can surrender the whole end, principle or object willed, for such surrender can take place only through persuasion or force. Geingob (2004) argued later that the concept of bicameralism, as sought and secured by non-SWAPO parties, was ill-conceived for various reasons. First, Namibia was conceived to be a unitary state and not a federal state, and regions were administrative rather than political units. Second, as in the United States, this was an attempt to balance rights attached to individuals with rights attached to regions. Nonetheless, bicameralism was adopted in Namibia, a unitary state, in the spirit of compromise by SWAPO. SWAPO also accepted the concept of bicameral parliament, because it considered that the regional aspect of the second house would be very useful in bringing

democracy closer to the people. This thinking was in tandem with SWAPO's belief in the de-concentration of power from the centre to the periphery to make decisions more relevant to the developmental needs of the regions. As illustrated by Geingob's conclusion, a compromise may also be wrong because it has aesthetically bad consequences. In this case, SWAPO accepted the bicameral concept only because they wanted to live with the spirit of give and take. In reality, the second chamber has proven useless and a waste of resources. Compromise is not an end in itself but a means to the resolution of conflict.

One of the sticking points at the Windhoek Assembly was the power of the president to make appointments to certain positions. Particularly, members of the opposition parties were worried about judicial appointments. As a result, they proposed that all appointments made by the president should be ratified by parliament. Ruppel held a contrary view, arguing that

...as a matter of principle one should really not use parliament to okay every executive action which is necessary in the running of the country. It is really overburdening the functions of parliament. I think there are certain things which must be done by the president. He appoints, but he must not every time run back to the legislature. There is a separation of functions. The legislature has one kind of function, namely that is elected to make laws. That is its principle function and we must not use that body for all sorts of other work if it is really not essential. So I strongly move that this appointment is a clear appointment and not subject to any other person's approval. If somebody is desperately unhappy with it, they can always review that decision.¹⁵⁴

He was supported by fellow SWAPO delegate, Pendukeni Ithana who warned that

if we are subjecting every appointment to the approval of the National Assembly, we may scare some of the people who would do a better job if they are given that opportunity, if we will subject their lives to be discussed in parliament.¹⁵⁵

Gurirab amplified her point:

I hope that we will not be selecting and appointing criminals for any position in the state organs, but we want to ensure that the president of the Republic of Namibia does not appear on the paper as a paper-tiger, a puppet president of

¹⁵⁴ *Ibid.*, 19 December 1989.

¹⁵⁵ *Ibid.*, 19 December 1989.

parliament. We don't want to send such a message across the land or abroad for that matter. He will be a democratically president, popularly elected – I hope that what we will agree – and we should give him such flexibility and authority within the boundaries of this constitution to carry out his responsibilities for the life of his office and therefore every bit of appointment does not really have to be approved by parliament. We are not dealing with a person who installed himself, declared himself emperor. We have already gone a long way in emasculating the powers of the executive president. I think at some point we should be conscious about the kind of executive president that we would like to have as head of our state.¹⁵⁶

Katjiuongua disagreed with the SWAPO position. To make his case, he cited an example of the United States where

...the chief of the joint chiefs are confirmed by the Senate and this is done in some other countries as well. So, that is also an opportunity to find out that the president is not employing criminals – and I don't want to use the word, but it was used by my colleague here...¹⁵⁷

On one hand, SWAPO continued to argue that Judges should be appointed by the president on the recommendation of the Judicial Service Commission. On the other, the opposition parties insisted on parliamentary approval of all appointments. The total sum of the opposition fears were captured by Vekuii Rukoro:

This question relates very seriously to the whole question of the independence of the judiciary who, in my opinion, really are the final defenders of this constitution. We can say that the president must protect the constitution, but in the final analysis it is the courts of law who are going to come in and say: "Mr President, you are going too far." That is why I feel that apart from the approval by the National Assembly, which is subject to the changing majorities, you need an independent body of provision with integrity to in the first place recommend, (a) both in terms of appointments and (b), in terms of dismissals and for the Assembly to debate these matters subsequently. But to leave them simply to political complexion of this House. I

¹⁵⁶ *Ibid.*, 18 January 1990.

¹⁵⁷ *Ibid.*, 18 January 1990.

don't think that is too reassuring in terms of the independence of the judiciary in the long term.¹⁵⁸

What appeared to be a compromise came from the ranks of the opposition parties in the person of Dirk Mudge of the DTA:

...I fully support the principle that the president must not be free to arbitrarily appoint people, but on the other hand I also support the view that it is not for a legislative body to discuss appointments. I am not very happy with that. The alternative is that we make sure – and think this also in line with what our learned friend said right now – that the Judicial Service Commission and the public Service Commission must be appointed in a very, very responsible manner. Those must not be lackeys of politicians. They must be professional people as far as possible. I reserve the right, when we come to the appointment of the Judicial Service Commission and the Public Commission also for the interim period, that we make sure that we have the right people there. Then the appointment by the president will in fact be a formality. I think this was always the case. I don't think presidents normally appoint people without having been assisted by professional committees and bodies, unless they want to make it a political appointment...¹⁵⁹

Barnes felt strongly in favour of discussing presidential appointments in parliament for various reasons. Primarily, he thought parliamentary approval would also serve as a vetting process:

I just want to cite a very, very recent example. Very recently the president of the United States wanted to appoint a certain secretary. If that secretary didn't appear before the senate Committee, and despite the findings of the Senate Committee this man was absolutely – I could use the word corrupt, He was an alcoholic, he was a womanizer, but the president of the United States insisted on appointing Brown and the Senate Committee turned it down. This saved the people of the United States a lot of embarrassment. The idea that a person would feel that he is being scrutinised, If he has nothing to hide then he has nothing to hide and then – without due respect to honourable Ruppel,

¹⁵⁸ *Ibid.*, 18 January 1990.

¹⁵⁹ *Ibid.*, 18 January 1990.

defending a position of appointment in here – that also grants a reason that there is a need for parliament to approve or ratify.¹⁶⁰

Compromises are appraised as good or bad, better or worse, right or wrong, fair or unfair. For Aristotle, the means by which we communicate our reasoning to each other in political deliberation is the particular form of persuasive speech he calls deliberative rhetoric. We deliberate together in political communities by making and listening to each other's attempts to persuade us that some future action will best serve the end that citizens share with each other, the common good or advantage of the political community. It is this shared goal that distinguishes deliberative rhetoric, and therefore public reasoning, from the other forms of rhetoric and political judgment that Aristotle examines. When we make legal judgments, forensic rhetoric seeks to persuade us of the justice or injustice, the guilt or innocence, of the people that we put on trial. When we make judgments about rewards and censure, epideictic rhetoric seeks to persuade us of the honourable or dishonourable character of the individuals under consideration. And when we make judgments about the making of law and policy, deliberative rhetoric seeks to persuade us that one course of action rather than another will best serve the common good or advantage (*Rhetoric* 1351b).

The most widely debated conception of democracy in recent years is deliberative democracy - the idea that citizens or their representatives owe each other mutually acceptable reasons for the laws they enact. It suffices to say that deliberative democracy contributes to our understanding of how democratic citizens and their representatives can make justifiable decisions for their society in the face of the fundamental disagreements that are inevitable in diverse societies. Like the deliberation of each individual, political deliberation seeks to determine which acts will most contribute to the ends that we seek to achieve. It deals with contingencies rather than necessities, since no one deliberates about things that cannot be done or actions that we cannot avoid performing. And it focuses on the consequences of future acts rather than, as in our judgments about justice and injustice or praise and blame, on our assessment of acts that have already been performed. Thus, a compromise is good when it resolves the conflict between the parties. This is a prudential consideration, because it is in their interest that the conflict should be

¹⁶⁰ *Ibid.*, 18 January 1990.

resolved. The sense of “good” involved is instrumental. The compromise is good as a means to the end of resolving the conflict. Ngarikutuke Tjiriange weighed in on the debate:

I do understand the sentiments of the previous two speakers, but the question was asked: If you make the Public Service Commission subject to this approval of the Assembly, it means it has been given the mandate to appoint those people that they are supposed to appoint. Now whilst they appoint them, why should the people that have been given the mandate to appoint, go back again to the Assembly again for approval? That makes it twice. They have delegated powers to appoint. Once they have been appointed by Assembly, then they are carrying out the job which we have appointed them. Whoever they appoint is on the delegation of powers from the Assembly.¹⁶¹

Rukoro conceded that the final appointment must be made by the executive, but on recommendation of the judicial Service commission.

...that being the case, once the Public Service Commission or the Judicial Services Commission was itself approved by parliament – as we are about to agree – then in that case the second approval by the National Assembly falls away.¹⁶²

The compromise can be accepted by all because it bears the imprint of all. Discussion has as its purpose compromise, and therefore the achievement of compromise is the justification for discussion in a democracy. If there has been no compromise, discussion has been useless. This exchange between Hage Geingob, the chairman of the committee, and Moses Katjiuongua, illustrates the nature of heated discussion:

Chairman: It is true, agreement was reached, but Mr Mudge spoke about the practical situation. He said: “For practical reasons we have agreed for the first five years. Five years. Let us face it that unless we want to score points and I think we have passed that stage...” and he went on.

Mr. Katjiuongua: How does that differ from what I am saying?

Chairman: I deliberately asked what the agreement is. We seem to have misunderstanding that is why we are wasting time.

¹⁶¹ *Ibid.*, 18 January 1990.

¹⁶² *Ibid.*, 18 January 1990.

Mr. Katjiuongua: No, I am not wasting time. Mr Chairman, don't say I am wasting time.

Chairman: I said "we". The chairman has the right to put the decision here. I asked what has been agreed upon, whether we all understand one another.¹⁶³

From a pragmatic perspective, seeking consensus with those who oppose you often makes exceptional sense. If there is an element of truth in the attacks on you, going head-to-head with your opponents could provoke an ongoing dispute that will bring out all the gory details. When an attack comes from an individual with a legitimate complaint and if they are willing to compromise, then the cooperative route may be the best way to go. However, attacks don't always come from honest brokers, but from individuals with agendas that offer no room for compromise or cooperation. They are attacking for their own reasons and giving in not only plays into their hands, but also risks giving them an excuse to up the ante. If a majority engages in discussion with a minority, and if that discussion is conducted in a spirit of give-and-take the result will be that the ideas of the majority are widened to include some of the ideas of the minority which have established their truth in the give-and-take of debate.

Rhetoric of conflict resolution

Another area of disagreement related to the nomination of persons to the national assembly by the president. Arguments for the proposal were advanced by Vekuui Rukoro, a member of the opposition. His arguments were based on the fact that there are people out of politics with some expertise and could make some contributions but who do not wish to submit to a rigorous campaign for political office. Another member of the opposition, Dirk Mudge opposed that proposal "on principle grounds [we] cannot accept appointed members to an elected body."¹⁶⁴ Rukoro made another effort to convince his comrade:

But the problem is that because we have that expertise, they are not good with politics, generally. How we are going to affect the balance in this House if they don't have the right to vote? Their only contribution is to bring their expertise to the benefit of the nation and the president is not going to appoint them because they belong to the ruling party. That is why I really urge you in

¹⁶³ *Ibid.*, 18 January 1990.

¹⁶⁴ *Ibid.*, 15 December 1989.

the national in the national interest, to simply let this provision remain...If that can be done with you changing the balance of power within the Assembly, and at the same time serve a paramount national interest, like for instance the representation of distinct interest groups in this country, whether we talk of organised labour, whether we talk of organised commerce, or for instance, as I proposed in the House in my submission, the representation of traditional leaders. These are hopefully non-party political interests and concerns, they are of vital interest to all of us, and provided the president, acting on the advice of the cabinet, can make appropriate appointments of these people to the national assembly so that we can benefit from their direct input in terms of policy formulation, without themselves having the right to vote when it comes to the vote. That does not affect the balance of forces in the house and therefore I can only see it as really adding to the strength of the functional democracy, rather than running counter to the democratic principles. I would really urge reconsideration of retaining that principle.¹⁶⁵

Katjiuongua, like Mudge, did not support the idea of appointing outside members to the national assembly:

I think it will be an insult to 72 members, elected members in this House to go and look for a talent outside, to say we are not good enough, we don't have the expertise. We have to bring in somebody from outside who was not prepared to stand the democratic test.¹⁶⁶

There is a threat to compromise if party militants reject compromise by their party leaders. To the extent that party leaders follow this demand, of course, they make democratic government difficult if not impossible in a multiparty system. Compromise thus acquires a shady side. This, of course, it can have in any political system. Compromise, even in a democracy, can be carried too far in a log-rolling sense. This kind of duplicity can lead at worst to a double standard in politics. Such a double standard has seldom, if ever, been fatal to a political system. In an attempt to refute the arguments for the proposal, Hamutenya missed the opportunity to make a case based on facts and reasons:

For me the problem is not so much about the democratic nature of this exercise. My problem is criteria of choosing these six. I foresee problems

¹⁶⁵ *Ibid.*, 15 December 1989.

¹⁶⁶ *Ibid.*, 15 December 1989.

down the road in any attempt to appoint these six individuals. I have listened to the various criteria advanced here, but I still foresee problems. If it is a question of proportion, what does it change? It will still leave the question the same. If we need more people, why don't we increase the number of the assembly from 72 to 78, then you solve the problem if the number of the seats in the Assembly is the problem. Proportionality will simply get us back to where we are in the terms of the balance of forces in terms of parties. I cannot see very objective criteria which will be acceptable for all of us here to appoint the six people I have a problem with this clause myself. If it was left to me I would do without it.¹⁶⁷

While Mudge supported Hamutenya, he sensed a great deal of consensus on the matter. Still, he took a neutral route, that "...depending on what we are going to decide later, then I will agree that we move on."¹⁶⁸ On the pluralistic theory of moral obligation a person who is called upon to act in one way or another or to abstain from action in a given situation may be subject to many different and conflicting claims or obligations of varying strength, arising out of various factors in his past history and various relations in which he stands to various persons, institutions and communities. Whichever alternative he chooses, he will fulfil some of these component obligations and in doing so he will necessarily break others which conflict with the former. In such cases, the right action is the one which makes the best compromise between the several conflicting claims, when due weight is given to their number and their relative urgency. But no general principles can be suggested for deciding what the best compromise is.

The philosophical problems about compromise fall under the heads of problems of interpretation and problems of valuation, though some of the problems come under both heads. For instance, virtually all writers on compromise comment on the fact that our attitude towards it is ambivalent. On the one hand, to be uncompromising is to be obstinate and inflexible, so that it is morally right to compromise. On the other, to compromise is to be a trimmer and a time-server, so that it is morally wrong to compromise. Trust is a relationship of reliance. A trusted party is presumed to seek to fulfil policies, ethical codes, law and their previous promises. Trust does not need to involve belief in the good character, vices or

¹⁶⁷ *Ibid.*, 15 December 1989.

¹⁶⁸ *Ibid.*, 15 December 1989.

morals of the other party. Persons engaged in a criminal activity usually trust each other to some extent. Also trust does not need to include an action that you and the other party are mutually engaged in. Trust is a *prediction* of reliance on an action, based on what a party knows about the other party.

The two faces of compromise are always with us. Every political system and, more important, every human being - must choose between them. If politics were the sum total of human life, there can be no doubt that the politics of compromise would be preferable. Compromise is indeed the rule and the art of the game of politics. Ethical action in politics, as elsewhere, is always an "either-or" proposition (Rintala 1969). At the Windhoek Assembly, it was not possible to negotiate a package of compromises although it was possible to offer one in exchange of some other agreement elsewhere. The draft constitution made provision for a council of ministers. But the president, in the exercise of his functions, was not obliged to follow the advice tendered by the council. This was worrisome to members of the opposition who feared a repeat of the African experience in Namibia. Barney Barnes summed up the opposition stance:

There is no other option. In accordance with the principle of the executive presidency, the president – and I think we have to in all sincerity think not in terms of the negative experiences from Africa and Third World – the principle in an executive head and I think if we go to the extent of saying “on the advice of”, as opposed to “in consultation with”, I don’t know what we are doing to ourselves and the future institutions here. I strongly and very humbly oppose. I would think that “consultation with” is an executive, practical, conventional decision making procedure. I don’t think, because we are bound by our negative experiences; take stereotypic examples from negative quarters. I think we have to be very frank, we are not making this for ourselves, quite obviously, and I also want to say that when we are making these decisions, we must know that we are not even in the position in which our comrades were in Zimbabwe, where our colleagues from Zimbabwe were pointing to Lancaster House. This is a historic opportunity we have been given as Namibians to write this constitution ourselves, either to mess it up to take in to account our actions that we are taking today, and I am inclined to think that

we are thinking too much of the immediate environment. "In consultation with" is appropriate.¹⁶⁹

As stated elsewhere, one of the outstanding facts of contemporary politics is its emphasis on compromise. The willingness to compromise is praised as the mark of the "reasonable person." Conversely the refusal to compromise seems to be one of the most important marks of the person who is outside of normal politics. This contrast was almost visible in the exchange between SWAPO, on one hand and the opposition parties, on the other:

Mr. Ruppel: Yes, I think the more crucial one, and we are getting bogged down on some technicality, the principle is stated in paragraph (2) which is clearly stating the joint exercise. It says: "The executive power vests in the Cabinet headed by the president", and whether you say here at the bottom "in consultation with and on advise" doesn't make a big difference, because the executive function of the government vests in the cabinet headed by the president. So it is really splitting hairs, it is not going to make a difference at all.

Mr. Katjiuongua: ...I think the word "obliged to in consultation" is important. It looks like he is going to take decision after consulting. When you are obliged to somebody, it means you must take their advice, and if you say "advice" it is not good for his dignity.¹⁷⁰

The term "compromise" is also used sometimes to designate what are really two variations of the method of persuasion. First, even when there is goodwill on the part of two parties and the method of persuasion would ordinarily be used, in a given case a decision may have to be made before there is time enough to resolve the matter in the ideal manner. One may have to accept the other's point of view or both accept a third. The two parties may be said to have compromised, but only in the sense that, though the method of persuasion was willed, circumstances beyond their control prevented its usual consequences from being realised. Secondly, sometimes it happens that, even with goodwill and after a great deal of thought and discussion on the part of the disputants, there remains a considerable honest difference of opinion. Consequently, it is necessary to reach some compromise position.

¹⁶⁹ *Ibid.*, 19 January 1990.

¹⁷⁰ *Ibid.*, 15 December 1989.

Politics, many contemporary students of politics declare, is concerned with the conflict of power-seeking interest groups. As a result, debates about the nature of politics have traditionally submerged issues of process in controversies about what actors and issues to think of as political. That people should disagree about the scope and domain of politics is understandable both because politics is an elastic concept and because the debate is itself a high stakes political struggle. As Lasswell and Kaplan (1950), Dahl (1957, 1968) and Baldwin (1979, 1980) have demonstrated, the relevant sources of power vary across different issues, actors, institutions and political arenas. Moreover, how people use those resources varies with prevailing rules and norms. Consequently, theories built around issue-oriented puzzles are likely to conceptualise the nature and uses of power in significantly different ways. The same observation can be made about linkage politics. Politics almost always involves linkages across multiple arenas, but the number and character of the political arenas are likely to vary across time and different issues, actors and strategic contexts. However, while the debate is understandable, it is too often destructive and self-defeating. The scope and domain of the political vary for the simple and inescapable reason that the primary actors and issues, plus the goals and values of the participants, vary. There are times when those faced with a decision in the real world of politics will decide on a course of action that on the surface appears to be a despicable compromise or even an outright sell-out, when in fact, if all the details were known, they are doing what is best for the very cause embraced by those condemning them for their compromise. Political decision-making is overly sensitive to the demands of organised interest groups and relatively insensitive to the demands of unorganised groups. That is, not all parties affected by political choices are represented at the political bargaining table. While compromise is commonplace among politicians representing organised interest groups, the fact that many politically affected people are not party to these compromises means that political compromises are selective. It follows, then, that the public interest is anything and everything that can be secured by the mediation of conflicting claims for power. Compromise not only is a worthy, self-sufficient political ideal but the distinguishing and essential characteristic of democracy as a form of government. It is correct that Ruppel was not at all being truthful as to the exact significance of “in consultation with and on advice”. The fact that the opposition parties sought to include them is itself significant. But it was not in SWAPO’s interest to do so.

SWAPO had to compromise for the general good. At a time when clarity and agreement as to the meaning of democracy are so vitally essential, it is appropriate that such a view should be examined with care. For if opposition members reason that truth, justice and freedom are too ambiguous to serve as guideposts in the democratic solution of conflict, then such an assertion can and should not go unchallenged.

Geingob (2004) writes that, as regards presidential elections, there was unanimity that the president should be elected by direct, universal and equal suffrage, with Namibia as one constituency. Further, the elected candidate must receive over 50% of the votes cast. If necessary, a number of ballots should be conducted until such a result is achieved. In reality, there was no unanimity at all. On one hand, SWAPO had wanted a directly-elected president. On the other, the smaller parties wanted the national assembly, sitting as the Electoral College, to elect the president. There were several reasons advanced for the two proposals: first, Hidipo Hamutenya of SWAPO, argued that

I believe very firmly in the notion of separation of powers and for that reason I seriously have problems to agree to the proposition that the president should be elected by the legislature, whether it is single chamber or bicameral, because once you have done that you cannot talk about the president as being on par in terms of power-sharing with the legislature anymore, because he is an appointee of the legislature.¹⁷¹

For the opposition, Dirk Mudge argued that the proposals in the working document concerning the president are politically unwise and practically impossible.

The direct election of a president in accordance with the SWAPO-proposals, or the working document emphasise ethnic divisions, and I think we must do everything in our power to avoid that, because such an occurrence could very well lead to national disunity. Further to this question of the direct election of a president after every five year. It will also mean that two national elections – one for a National Assembly and one for a president – will be held at the same time and apart from the administrative cost other complications, this lead to overall disruption of National life. Politically the proposal for a directly elected president is unsound and dangerous, because it denies the existence

¹⁷¹ *Ibid.*, 15 December 1989.

of a multi party system and begs for the..... of all state powers and the creation of a one-party system. That is our view.¹⁷²

He was aided by Eric Biwa of the United Democratic Front, argued as follows:

The main reason why I opposed to the direct election of the president is because I don't believe that a president, directly elected by the electorate, can be controlled by the parliament. There is a serious need that the parliament must be controlled by the cabinet and the legislature.¹⁷³

But Biwa later conceded that "after we have agreed on a number of checks and balances intended to keep the president in check, I can agree to the direct election of the president, provided I am assured that these checks and balances can keep the president in check although he is directly elected."¹⁷⁴

As Smith (1942) argues, compromise arises in the narrow context of social necessity and functions in the expanding context of individual growth and social progress. By transmuting the necessary into the desirable, men of goodwill make some minimum freedom of their uttermost fate. That every social situation requires some compromises is a truism that can readily be granted but that the necessity or inevitability of making compromises thereby renders the practice desirable or even tolerable, does not logically follow.

Later, Mudge reopened the debate about the election of the president. He proposed that the president be elected by parliament in the mean time and that parliament appoints a commission to investigate the modes of electing a president directly which can then be considered by parliament.

In other words, the constitution can be amended but then we know exactly what and how, on the condition that the civil service commission is appointed by parliament...that the president need not be a member of parliament, but that the president should be accountable to parliament in the following manner: that when his vote comes up for discussion, he must then personally appear in the parliament to defend his vote, as is the case normally with various, because there will be a vote, the vote for the state president. That he must appear and then that will be the opportunity for the members to confront him as far as his policy is concerned.¹⁷⁵

¹⁷² *Ibid.*, 15 December 1989.

¹⁷³ *Ibid.*, 15 December 1989.

¹⁷⁴ *Ibid.*, 15 December 1989.

¹⁷⁵ *Ibid.*, 19 January 1990.

This proposal would not come down well with SWAPO delegates who thought they were gaining the upper hand on the election of the president. Gurirab responded in a very strong language:

Thank you very much, honourable Mr. Chairman. I didn't think that I was going to ask for the floor so early in the deliberation but I was prompted to do so by the honourable Mr. Mudge's intervention...After the various parties introduced their constitutional proposals in the assembly, the work of this committee commenced. We had a series of deliberations in this committee. We identified collectively and confirmed that there were three areas of material dispute: the presidency or executive presidency, the voting method and whether we would have one or two houses. It was with those three issues before us that we deliberated and indeed agreed on a package. We wanted, as we do now, an executive president elected by the people. We wanted a voting system to be a single member constitutional system and we wanted only one house. We accepted PR system, not single member constituent system. We also accepted in principle that there would be a second house that was the package. I don't know what will happen further down when we get to the second house business. We are still now seeking to, in my view, emasculate the presidency, the executive and to talk under the present circumstance about yet another package seems, and the way that the proposal was presented, is certainly to my mind quite disproportionate. It is a very substantial proposal that honourable Mr. Mudge has made, and certainly he heard me speaking yesterday, he cannot expect us to even as much as give serious consideration to his proposal as it stands...thank you.¹⁷⁶

Political power is exercised today through a profusion of shifting alliances between diverse authorities in projects to govern a multitude of facets of economic activity, social life and individual conduct. Power is not so much a matter of imposing constraints upon citizens as of 'making up' citizens capable of bearing a kind of regulated freedom. Personal autonomy is not the antithesis of political power, but a key term in its exercise, the more so because most individuals are not merely the subjects of power but play a part in its operations. Foucault (1979) argued that, since the eighteenth century, this way of reflecting upon power and seeking to render it

¹⁷⁶ *Ibid.*, 19 January 1990.

operable had achieved pre-eminence over other forms of political power. It was linked to the proliferation of a whole range of apparatuses pertaining to government and a complex body of knowledge and “know-how” about government, the means of its exercise and the nature of those over whom it was to be exercised. The ultimate aim of politics is to access power. Posed that an uncompromising person is one who is not disposed to make any concessions, a compromising person is one who is pliant and disposed to make concessions - regardless of whether he receives any concession in return.

However true this may be, one must insist that compromise necessarily involves mutual concessions on values. If a compromise is to approximate a solution to conflict rather than being a temporary truce, it must be made within a framework of interests and values commonly shared and mutually respected by all parties to the agreement. If it is to approximate a solution, moreover, it must embody what is best in all proposals and this can be determined only by appealing to those common interests and values that are shared. A compromise is not good in itself; it is good only if it leads to good results. But one can know if it will lead to good results only by subjecting the substance of the compromise to the test of some ideal goal one hopes to attain.

Diplomatic approach

Members of the standing committee have sometimes resorted to a ‘diplomatic’ approach. This has been a constant attitude among participants since the very beginning of assembly. Agreeing on an ambivalent concept or on a flexible wording, leaving room for different interpretations and thereby preventing the emergence of overt opposition, is a well-known constitutional device (Sunstein 2001). Sometimes, the authors of a constitution even agree to leave controversial issues out of their agreement, so as to avoid incompatibilities (Holmes 1988). Hidipo Hamutenya was always there to break deadlocks. During a discussion on the mode of election of the president, he proposed how the committee can move forward:

Mr Chairman, we can’t read the minds of the people, what they will do tomorrow or the day thereafter, we can only draft a constitution which we hope will work. I think the advice given by the legal experts do provide grounds for us to move forward in terms of tackling the formulation of the constitution. Suspicion cannot be resolved here; it has nothing to do with what

we are writing. If we are writing a constitution based on suspicion, we will make no progress whatsoever. What is crucial is that I appeal that we proceed with article 28 with the proviso that wherever our colleagues of the DTA would wish to refer back in this constitution to the power of the president and the relationship between legislature and the judiciary, even in relation to those clauses we have already agreed to, that they be allowed to refer back, as long as it only relates to the power of the president. I hope that we can go a long way to allay their fears. If we can allay their fears, then I think we will progress...If it is an acceptable proposition, I think we can go somewhere. We can break the impasse where we are now stuck.¹⁷⁷

In many instances, the decisions of the Committee can be understood in these terms. More importantly, the major institutional compromise of the assembly can be seen as an instance of a 'diplomatic agreement'. However, spreading out the incompatibility in time, "in the hope that later circumstances will be such that the choice can be avoided or the decision taken within a better understanding of the issues" is a risky strategy, because it "can create new and more serious (incompatibilities) in the future" (Perelman and Olbrechts-Tyteca 1969: 200). The principal merit of this approach is that "it encourages a continuation of the dialogue" (Perelman and Olbrechts-Tyteca 1969: 201). But this strategy was, by itself, in contradiction with the very *raison d'être* of the Assembly.

The 'practical' approach was the dominant style adopted by the standing committee members. On most issues, during the plenary sessions but also within the working groups, the meetings of the components or the parties, the members tried to explain their position in terms of concrete impact, not by referring to abstract concepts or to emotions. As a way of illustration, the remarks by Prof. Mburumba Kerina of the Federal Convention of Namibia, created context:

I have been trying to trace the beginning of the discussions with regard to the constitutional draft before us up to the time when it was referred to the attorneys, and the product that we now have before us. Mine is just a humble appeal. We have travelled a road to be here, and I think as a newcomer to the discussions I am very honourable to be part of the spirit that has been demonstrated by all the parties and all the representatives of the various

¹⁷⁷ *Ibid.*, 18 January 1990.

parties in this committee. I have listened very carefully and sensitively to the reservations, to the disagreements, to the agreements and to the disagreements of the agreements, and I think finally we are at the point where we have to find a solution to what we have been discussion this morning. I don't think there are serious differences. I think the test relating to the president is very clear and I would like to appeal to all of us to agree that the first president be elected the National Assembly as stated in this draft.¹⁷⁸

Beside this practical pattern of thought, logical arguments have also played an important role in these debates. A priori, one could assume that a rationalist mode or argument would be impossible in such a divided assembly. This approach indeed assumes that "one can clarify sufficiently the ideas one uses, make sufficiently clear the rules one invokes" and that "the unforeseen has been eliminated, that the future has been mastered" (Perelman and Olbrechts-Tyteca 1969: 198). With the Namibian people waiting for independence, delegates to the Windhoek Assembly were conscious not to be seen to be playing delaying tactics. Thus, there was pressure to agree. Biwa espoused this view more clearly:

I am not taking the floor to offer a solution; I merely want to state our position in regard to this issue under discussion. Unfortunately some of the things I wanted to state were overtaken by events; therefore I will confine myself to those things that keep within the framework of what we have agreed upon. But I would like to state that it is the feeling of our caucus that we stick to the agreement which is reflected in the draft, namely that the president will be elected by the National Assembly and that he will be a member of the National Assembly. But in the spirit of what we have decided to do now, I would like to state that we – and that is the feeling of everybody – are prepared to go along with an arrangement or a provision where the president is elected directly by popular vote, provided that the powers conferred upon the president and the limitations put to the exercise of this powers are not affected in any way. Secondly, provided that parliament has the power to impeach the president and I think that is provided for in the constitution, and we would like to agree well in advance, while on this issue, that we will allow the parliament to impeach the president. Thirdly, there should be a provision

¹⁷⁸ *Ibid.*, 18 January 1990.

in the constitution empowering the president to address parliament and giving the members of parliament that power to question the president.¹⁷⁹

The insistence on the constitutional nature of the assembly's task, combined with the legal background of some delegates, fostered arguments moulded in legal terms. The committee had members with legal training. Their participation, especially on matters related to resolving conflicts through compromise. Applying legal arguments in the context of constitutional negotiations was substantively helpful. First, it provided a jargon which was largely shared by the members and could be a negative equivalent of a common language. Secondly, lawyers – like theologians – tended to forge their arguments on the basis of widely accepted, if not uncontested, texts: this provided deliberation with a set of common written references. Thirdly, and most importantly, law is by definition a means to build compromise: “Legal progress consists of the development of techniques – which are always capable of improvement – that make it possible to reconcile conflicting claims” (Perelman and Olbrechts-Tyteca 1969: 414).

Indeed, lawyers are routinely asked to negotiate the vexing, layered and often emotionally-charged problems that others have finally relinquished to the care of professionals. Much of the stuff of these problems can be articulated in terms of common law rights and duties, statutory rules and remedies, costs and benefits, profits and losses. But within the pores of these dispassionate analyses lurk the lost child and the quivering voice, the full scope of the client's need and history-fed bitterness over disputed boundaries. In contemplating the root cause and ricocheted effects of legal problems, and in managing the matrices of human interaction that arise in negotiated attempts to solve them, lawyers rely on an inductive process of knowing that is driven as much by emotional sense as it is by more dispassionate logics. For lawyers, the final destination of virtually all individual deliberation is collective deliberation. In lawyering, the thinker deliberates in service of a larger endeavour (a dispute, a lawsuit, a transaction, a legislative proposal), which invariably involves decision-making by at least one other person (at minimum, the client). Collective deliberation is, of course, the most basic form of negotiation, and be it preparing for litigation, conducting a private settlement hearing, or addressing the Senate – it is the currency of legal practice.

¹⁷⁹ *Ibid.*, 18 January 1990.

Compromise as a social heuristic

The social heuristic uses human capacities for social learning and imitation. In brief, this heuristic is based on choosing what the majority of one's peers are choosing. Compromise is a useful device for dealing with small items with people you see in an ongoing relationship. But we run into trouble when we split the difference in situations in which a compromise will harm everyone involved. The term *social heuristics* to refer to the rules of thumb people use to make snap decisions in social environments, in part to reduce conflict. Similarly, negotiators tend to compromise not because splitting the difference is the best option, but because they have learned that such social heuristics get them through life with less hassle. The best illustration of this point can be found in the discussion on whether the number of ministries should be stipulated in the constitution or left to the discretion of the president. Barney Barnes proposed that in order for the new government to gain credibility, the number of ministries should be related to the size of the population of the country. This view was shared by Dirk Mudge:

I don't have a problem with the number because I am sure the assembly will have to vote the money for the salaries of these people. So if the president would continue to appoint too many ministers, he will definitely find a slight problem to get the necessary funds to pay their salaries.¹⁸⁰

Peter Katjavivi felt there was no need to determine the number of ministries in advance. He proposed instead that the president should have some flexibility to create and dissolve ministries as circumstances dictate. Hage Geingob argued that stipulating the number of ministries in the constitution will be cumbersome because if the president needed to increase ministries, a constitutional amendment will have to be sought. As stated elsewhere, the debate about the number of ministries in Namibia has been ongoing for some time. As at the time of this research, Namibia had twenty six ministries in a country of about 2 million people. Therefore the wisdom of this compromise becomes illogical. When the compromise is illogical, the tendency to rely on social heuristics can be dangerous. Far too often, in an effort to make sure that all are included, we compromise on the content of a decision. But true respect for the opinions of others should mean that we can debate the merit of

¹⁸⁰ *Ibid.*, 18 December 1989.

alternative actions and make a choice, rather than compromise on a plan that is logically confused. But the opposition parties did not want to argue on small things, especially when the bigger fights were still to come.

At a political level, the term bipartisan describes the behaviour of responsible, cooperative politicians who drop their biased concerns in the search for value-creating changes for society. In other words, two parties co-operate regardless of the affiliation to support one cause. For example, on 8 December 1989, SWAPO and the DTA were united in their opposition to the Administrator General's stated intention to reserve schools for whites as part of the outgoing government's efforts to reach out to white interest. When true bipartisanship occurs, citizens should support such innovation. With regard to multi-partisanship, more parties drop the party label to identify as a united group. A good example is when all parties in the constituent assembly agreed to 21st March 1990 as the date for Namibia's independence. For purposes of this exercise, reference is made to the discussion on whether or not Namibia should adopt a bicameral parliament. At the Windhoek Assembly, a concern existed for diverse political-constitutional topics. One of them referred to the system of government: if from the proposed unicameral chamber of parliament we must transfer to a bicameral system. This concern arose because, according to the opposition parties, the balance of power has been inclined decidedly to favour the Executive. In the constitutional systems, there is a rule of underlying gold, not necessarily written, but inferred from its own structure of equilibrium of the constitutional democracy. According to this, to any increment of power there must be a corresponding strengthening of the controls, an improvement of individual rights or guarantees and emphases of the responsibilities. In other words: the more power the more control, better rights and superior responsibilities. This rule, which demands a correlation between the problems of the dimension of the power and the problem of qualification of the rights that achieve the equilibrium of that power, is pinpointing the need for an equivalence that, if it breaks, alters the functionality of the system and this one enters a slope. Katjiuongua was strongly for the bicameral chamber and he presented his argument as follows:

...Namibia needs national integration through institutions, thereby creating participation and liberating the people from fear or sectional loyalties. It is a form, over and above, of discussions and the right to speak as a numerical minority in parliament...that go beyond just merely speaking. There is a form

of institutionalised expression by which those who might not necessarily be elected by numbers can also express concerns and interests of the areas they represent...we feel that the elected majority, without becoming ineffective as a government, must take into account the views of the political minority of the day, the views that are relevant to national peace and stability.¹⁸¹

Nahas Angula was not convinced of the necessity of the two chambers of parliament, "But I will go by the decision of the majority, if the majority want a second chamber..."¹⁸² One type of decision which has the potential to arouse negative emotions are when trade-offs have to be made between two highly valued things as in the case above. Because making trade-offs can generate negative emotions, individuals may cope with emotion-laden decisions by avoiding strategies which use trade-offs and instead use non-compensatory strategies. Context is, perhaps, useful to explain this compromise. A debate had ensured whether there was a need to have two chambers and which of the two chambers was more senior than the other. Members of either chamber have argued that theirs was the superior house. By observing the functions of each chamber, it was not surprising to find that the national assembly, which has the powers to make laws, was the superior one. The national council on the other hand simply reviewed laws passed by the national assembly. SWAPO was clear from the beginning that it did not want a second chamber. The nature of the powers of the house lies in a bipartisan compromise reached between the parties at the Windhoek Assembly. But bipartisanship can also be a shortcut to lazy compromises for those eager to reach any deal at all. The negative emotions experienced while making a choice involving difficult trade-offs have been shown to impact on strategy selection and decision-making. In addition, evidence suggests that decision-makers tend to confront between-attribute trade-offs explicitly when attributes are relatively low in emotional trade-off difficulty, but they avoid these explicit trade-offs when attributes are higher in emotional trade-off difficulty. This compromise solution is not likely to be effective. A better solution would be to debate strong ideas that make conceptual sense rather than watering down elements of various plans. Too often, policymakers make compromise between strategies. While each strategy may be viable, the compromise is generally too weak to be effective.

¹⁸¹ *Ibid.*, 18 December 1989.

¹⁸² *Ibid.*, 19 December 1989.

Social heuristic should be understood through its relation to hermeneutics. Hermeneutics has as its principal task the formulation of a set of elementary or general principles for interpretation and construction. Toward this end, Lieber (1839) constructed "elementary principles of interpretation" and "general principles of construction." Conceived at a high level of abstraction, these principles function as regulative maxims. Along Kantian-transcendental lines, they regulate the understanding and so make interpretation and construction possible. In accordance with this conception of their nature and function, Lieber endeavoured only "to lay down the most essential principles, sufficient at least to direct attention to the main points" (65). He acknowledged the place of lower-level, more applied rules of interpretation and construction, and in the course of the *Hermeneutics* he intimates what some of them look like. But, generally, Lieber thinks that only regulative maxims lie within the scope of a general science, properly so-called. In this way, Lieber's most general contribution to debates over the Constitution was to show that the rules and principles which governed its interpretation and construction were entailed or implied by even more elementary or general ones. Lieber, in brief, provided a place for constitutional hermeneutics within the broader science of interpretation and construction which, in turn, was necessary "on account of the character of human language" (157).

Seizing as he did on words, Lieber (1839) underscored the importance of language to human life. He also intimated that the rules and methods of hermeneutic science had as their foundation the linguistic nature of human experience. In brief, Lieber believes that language instantiates a system of intentional signs which functions for communication, action and the constitution of certain social practices. Of the first of these functions, Lieber (1839) says that language is essential for "the most wonderful and most important [process] on this earth," namely, "the conveying of ideas from one distinct individual to another; for the communion of mind with mind" (442).

Weaker or stronger compromises sometimes crept in as a result of the time pressure felt by the delegates. In other words, time factor forced members of the drafting committee to compromise. As an illustration, Rukoro argued that the word "fraternity", whose opposite meaning is "sorority", is sexist and proposed that it be replaced with a more neutral term. The chairman, Hage Geingob, overruled him:

The word “fraternity” is neutral in this context and therefore I think, since we have now spoken for one hour, I want a clear decision that we deliberated on the preamble...and now finally agreed to it.¹⁸³

Time pressure has been shown to be one of the most important decision task variables. Errors in judgment can be made from either deciding too soon (rush-to-judgment) or from delaying decisions too long. History will tell whether the committee made an error of judgment.

In negotiation, the greatest form of power is a strong outside alternative to agreement. Therefore, if you already have a good offer, trying to bargain further with someone who knows you have nowhere else to go may not be the best strategy. The draft constitution included the word “secular” in its preamble. Kosie Pretorius had a problem with “secular” because “it has various interpretations...and is also contradictory to some of the rights...”¹⁸⁴ Hidipo Hamutenya defended the inclusion of secular on the grounds that

...this word appears in so many constitutions and it simply means that it is not a theocratic state...we don’t want another Iran here...we don’t want to mix up our politics...¹⁸⁵

But it was the arguments of Gerhard Erasmus, one of the three legal experts, co-opted to advise members of the drafting committee, who put more powerful arguments on the exact meaning of secular:

I am not going to consult the Bible. It is true that there is a popular meaning of the kind indicated by Mr. Barnes and the reference to the Oxford dictionary. The Oxford dictionary, on the other hand, is not an explanatory document on constitutional principles. There are examples of constitutions and I have got here, for example Malta and other countries where they explicitly state in the constitution that for example the Roman Catholic Church will be the official church of the country that they single out a certain religion, a state religion. What are you doing when you use a constitutional document and insert the word “secular”? You indicate exactly the opposite, that there will be that official religion. In a certain manner, it is support of the idea of freedom of religion, very type of religion for the people. The fact that in particular parlance

¹⁸³ *Ibid.*, 15 January 1990.

¹⁸⁴ *Ibid.*, 15 January 1990.

¹⁸⁵ *Ibid.*, 15 January 1990.

there is a meaning given to “secular” is correct. I think we must limit our interpretation to what we want in the constitution and what we want to convey in terms of the official position or not of church and religion in the state.¹⁸⁶

Pretorius is widely respected in the community for his Christian faith. Reconciling his strong faith and his opposition to include “secular” in the constitution is hard to understand. But he quickly understood that accepting the offer on the table and then asking for more may be the most effective route when you’re at a power disadvantage as he were. As Beresford and Sloper (2008) writes, choice is the outcome of a process which involves assessment and judgement; that is, the evaluation of different options and making a decision about which option to choose. In order for these processes to take place and a choice to be made, there need to be two or more alternatives from which to choose. In addition, these alternatives should have some positive value; in this sense a choice between something which is definitely desired and something which is definitely not desired is not a true choice. Individual differences in values will define what constitutes an accurate or high quality decision. It is also likely that human beings adjust their ‘quality standards’ as a function of task demands.

Conclusion

Deliberation is supposed to have an end. It is supposed to resolve something. Occasionally, deliberation yields a decision directly, as when a genuine consensus has emerged. But deliberative assemblies even of the most ideal sort more typically have to force a decision, announcing an end to the deliberations and calling for a vote. That final show of hands is what is crucial in conferring democratic legitimacy on the decision. However free and equal the preceding discussion may have been, the democratic credentials of the ultimate decision would be deeply suspect had it merely been left to the chairperson of the meeting to summarise the “sense of the meeting” with no ratification from others. But however crucial that distinctly non-deliberative final show of hands may be in providing democratic legitimacy for the decision, it is the preceding discussion which renders that decision a democratically deliberative one. Deliberation is expected to lead to empathy with the other and a broadened sense of people’s own interests through an egalitarian, open-minded and

¹⁸⁶ *Ibid.*, 15 January 1990.

reciprocal process of reasoned argumentation. Following from this result are other benefits: citizens are more enlightened about their own and others' needs and experiences, can better resolve deep conflict, are more engaged in politics, place their faith in the basic tenets of democracy, perceive their political system as legitimate and lead a healthier civic life.

A study of the proceedings of the Windhoek Assembly which framed the Constitution shows that many of the provisions of that instrument which are seemingly straightforward and artless rest in reality upon compromises after serious deliberations, often laboured and tortuous. The concept of compromise was the basis for Windhoek delegates' understanding of the process by which political disputes are settled. They also believed that given sufficient discussion, free from partisanship, the right solution to a dispute could be discovered. From the point of view of a party to the dispute, compromise involves compromising one's principles or beliefs without being convinced of their erroneousness.

Members of the standing committee have sometimes resorted to a 'diplomatic' approach. This has been a constant attitude among participants since the very beginning of assembly. Agreeing on an ambivalent concept or on a flexible wording, leaving room for different interpretations and thereby preventing the emergence of overt opposition, is a well-known constitutional device. Sometimes, the authors of the Namibian constitution even agreed to leave controversial issues out of their agreement, so as to avoid incompatibilities. They also resorted to applying compromise as a social heuristics. Similarly, negotiators tended to compromise not because splitting the difference was the best option, but because they learnt that such social heuristics got them through life with less hassle.

The appeal to fear strategy, as a means to enable delegate to better recognise the nature of the problems facing the political community and to begin thinking about potential solutions, was clearly at play at the Windhoek Assembly. From the perspective of the philosopher and informal logician, appeals to fear have been regarded as fallacious, as attempts by immoral rhetors to sidestep the standards of logic and reason in order to manipulate their audiences. This art was used effectively at the Windhoek Assembly.

CHAPTER FOUR

RHETORICAL CREATION OF COMMON GROUND

The situation here is that if the Attorney General is a senior member in a political party and he is appointed by that political party into a position where he is supposed to be absolutely neutral, professional in his actions. This is the question that arises in our mind. It is continuously said, political appointments. I would like to ask this question with due respect: Is the Attorney General, the Ombudsman, the Auditor General, the Governor General, the Director of Planning, are they part of the institutions administration or are they political figures, because the minute we politicize our departments and heads of departments, then we are heading for trouble...

Barney Barnes, 1989

Introduction

The previous chapter posited that compromise is one of the means of conflict resolution, not an end in itself and concluded that participants sit down together not in order to compromise but in order to achieve a shared outcome. This chapter investigates how the rhetorical creation of common ground influenced the outcome of negotiations for Namibia's Constitution by focusing on how highly controversial issues were resolved in favour of both parties. The key element in creating common ground is that each party works at understanding what the other really needs out of the negotiation. This, in turn, depends on being able to question the other party about their interests or otherwise discover what they really are. This vignette is just one of innumerable instances during the Windhoek Assembly debate which centred upon questions regarding the frequency of elections, the nature of the legislature and extent of legislative powers, national sovereignty and nature of the presidency. These arguments impact rhetorical praxis because the differing views on representation affected the course and substance of the Constitutional debate to the extent that some negotiators could not escape to negotiate a constitution that they thought was best. The chapter will conclude by investigating whether common ground evoked common places to help reach agreement on a negotiated constitution of Namibia.

Creating common ground

Let it suffice for now that common ground is not fixed: it changes through the course of the dialogue, by virtue of the physical context in which the interlocutors find themselves, but critically also by virtue of the linguistic context, that is, each interlocutor's contributions to the dialogue. When a speaker makes a contribution, he does so with the intention and expectation that it will bring about a change in the knowledge state of his addressee. Thus, common ground increments through the course of the dialogue. Indeed, successful communication depends upon the accumulation of common ground. By adding to common ground, the speaker may also be conferring obligations upon the addressee. If interlocutors are successful in accumulating common ground, then increasingly the private set of beliefs and knowledge with which each interlocutor started out the interaction becomes part of the mutual set of beliefs and knowledge that the two interlocutors share.

In any negotiation, the decision to put the first offer on the table is a double-edged sword. To the one who offers, there is a potential disadvantage: an initial offer conveys information about aspirations and utilities (Rubin & Brown 1975). Depending on the underlying structure of reservation, this information may cut off part of the range of potential agreements to the disadvantage of the one who offers. On the other hand, an opening offer may lead the opponent to perceive that settlements will favour the party making the first offer. This is more likely to happen when the first offer is an extreme one (Siegel & Fouraker 1960). Dirk Mudge at the very beginning of the meeting rose to take

the floor not because I want to dominate the meeting, please don't get me wrong, but I have done some homework with my colleagues...we have...taken your proposal as the basis for our discussion, not because I think it is the best proposal, of course, but because it represents the views of the majority and we have to take that into account.¹⁸⁷

SWAPO delegates were caught by surprise at the proposal of the DTA at finding common ground. Mudge narrated the differences between his party and SWAPO proposals, which he said could be ironed out by engaging legal advisors. He concluded by making it clear that he was not accepting SWAPO's proposal.

What I do say and what I said, I had to find out what SWAPO disagrees with us. So I had to look at their constitution and disagree with just for the purpose

¹⁸⁷ Windhoek Constituent Assembly, *Hansard of the Standing Committee on Standing Rules and Orders and Internal Arrangements*, 8 December 1989.

of identifying those differences let us look SWAPO's constitution. Then we will find the areas of dispute.¹⁸⁸

Even Pretorius said he was also prepared to accept SWAPO's constitution as a basis of discussion. Seemingly unprepared, Dr. Tjitendero responded on behalf of SWAPO to Mudge's proposal of accepting SWAPO's constitutional proposals as a working document:

I was very much impressed by the approach that Mr. Mudge took. I think it was beginning to show progress in that direction. The differences that were state in all the statements, is where there is a material dispute or fundamental differences in the submissions. If we go by bringing in all the tangents, then obviously we will subject this session again to the same discussions we had before. I think Mr. Mudge made a very progressive move by saying let's first adopt. In any conference you come to, you have a working document. You look for its shortcomings and its omissions, and then you try to fill that. So, I feel that we have the material in front of us here, which are all related to one thing, the constitution, and I assume and I thought the reasons why Mr. Mudge had suggestion.¹⁸⁹

One consequence is that many negotiators practice an elaborate form of *quid pro quo* (this for that) in which the initial object is to find out whether the opponent is willing to play by integrative principles. If the opponent won't play by these rules, the negotiator may feel safer reverting to a distributive approach. While all agree that joint-gain negotiations foster working relationships, there is some disagreement as to the strategies that one should use during the negotiation (Fisher, Ury & Patton 1991). Various techniques exist that lead to different levels of win-win outcomes. It is up to the negotiators to determine what outcomes are desired and what joint-gain negotiation technique is required to achieve those objectives. These choices leave many negotiators frustrated because of the time and energy needed to, first, determine the technique and, second, to complete the negotiation.

Flexibility has long been considered an important part of the process of negotiations. In the vast majority of situations, it is clear that some degree of flexibility is required in order for negotiators to reach agreement. Therefore, flexibility has often been considered to be a highly valued characteristic of negotiators. At the

¹⁸⁸ *Ibid.*, 8 December 1989.

¹⁸⁹ *Ibid.*, 8 December 1989.

same time, too much flexibility has generally been believed to encourage exploitation by other parties. Because of the mixed-motive nature of all negotiating situations, the dilemma faced by most negotiators is to identify the appropriate balance between the degree of flexibility necessary to reach agreement and the degree of firmness required to avoid being exploited and to assure oneself of an adequate share of the value being negotiated. There were varying degrees on whether death penalty should be kept on statute books in a future independent Namibia. Given Namibia's colonial past, some argued against it while others argued for it and still others were non-committal. Pendukeni Ithana was one of those who argued against the inclusion of the death penalty in the constitution: "We agree that the words from "except" up to the end must go. So, that it reads: 'No person shall be deprived of his right or personal liberty'."¹⁹⁰

Integrative negotiations recognise that information sharing and trust are necessary in order to achieve mutual outcomes that lead to sustained relationships. Most negotiators believe that information sharing is at the core of integrative negotiations. The greater the amount of useful information provided by each party, the more likely it is that perceptions converge and joint-gain solutions result. Ithana's intervention generated a very interesting debate between members of the drafting committee. For the sake of completeness, the dialogue is repeated:

Angula: Yes, I think that is a progressive step, but you must know what that implies. It means no death sentence in Namibia.

Chairman: That was the whole debate.

Angula: If that is what you are saying you must be careful.

Mudge: That is what we are saying, whether we agree or not.

Chairman: We are clear. No death sentence even if it is something very bad.

Bessinger: I am afraid that either I as individual was misled. After further consultation it was said that the "except according to procedures established by law" should remain. For that sole reason that until you have cleared up this issue of this sentence, we cannot remove that portion of the article. There are many grounds on which the death sentence is being argued for or against. We have to sort that out and then we can come back to that

¹⁹⁰ *Ibid.*, 8 December 1989.

clause...because we cannot just let it hang in the air like that. It hangs in the air with the deletion.¹⁹¹

Bench-Capon (2003) asks the question: Why do rational people disagree? There are many reasons. It may be through ignorance: if one of the parties is unaware of a crucial piece of information, they may refrain from drawing a conclusion until they discover it. It may be through weakness: it may be that one party, although in full possession of all the relevant information is incapable of drawing some required inference. It may be through deliberate fault: one party may simply refuse to accept a conclusion that has been demonstrated, although here rationality is called into question. Such disagreements can be resolved through education, explanation or goodwill. Sometimes, however, the dispute may seem to be irreconcilable: both parties agree on the facts, are capable of making the required inferences and be reasonable seekers after truth, and yet still they disagree. As Perelman (1980) puts it, "If men oppose each other concerning a decision to be taken, it is not because they commit some error of logic or calculation. They discuss apropos the applicable rule, the ends to be considered, the meaning to be given to values, the interpretation and characterisation of facts"(150). It is to resolve this kind of disagreement that the need for argumentation, intended to secure assent through persuasion rather than intellectual coercion, arises.

Too much rigidity on the part of negotiators risks creating stalemate, whereas too much flexibility by one of the parties risks exploitation by more rigid opponents. From the point of view of reaching agreement, flexibility is thus a valued commodity. But from the point of view of each party's own individual interest, flexibility may detract from winning a sufficiently large share of the benefits of the negotiation. The right balance is thus difficult to strike, and a negotiator is constantly faced with cross pressures between acting flexibly in order to reach agreement and behaving rigidly in order to avoid exploitation or to gain the largest possible share of the outcome. Vekuii Rukoro was very aware of the choices members of the drafting committee were faced with:

This thing can be taken to mean that the life of a person is sacrosanct except in deaths resulting from lawful acts of war. If we are in the war you have to shoot somebody in self-defence. So, that is one level where I will have no

¹⁹¹ *Ibid.*, 13 December 1989.

problem. If this particular proviso refers for instance to acts of war whereby soldiers and the police have to shoot in execution of their official functions. That is a different question. The proviso is intended to cover a judicially pronounced death sentence. If there are people who are for the death sentence as a verdict by a court of law, then maybe we need a debate on it...But if we talk in terms of the “according to the procedures established by law” in a different context, that I will accept, I have no problem with that one. We can even have “except according to the procedures”, as it is. I have no problem with it if it means things like self-defence or acts of war. But if it is supposed to include and allow capital punishment, judicially pronounced, then I think we need a debate on it.¹⁹²

But how is information entered into common ground? It cannot be the case that the mere act of producing an utterance is sufficient for the speaker’s intended meaning to become part of the speaker and addressee’s mutual knowledge. Instead, the successful accumulation of common ground requires both participants to establish that each utterance has been understood as the speaker intended. For the proposition to be grounded, that is, established as part of their common ground to the extent necessary for current purposes, both participants must take positive action to ensure that they “mutually believe that the partners have understood what the contributor meant, to a criterion sufficient for current purposes,” (Clark and Schaefer 1989: 262). Thus the speaker and addressee act under a mutual burden of responsibility. Clark and Schaefer (1989) suggested that they meet this *Principle of Responsibility* through a two-stage process of collaboration. In the first stage, the speaker *presents* an utterance for the addressee to consider. Then, the addressee *accepts* the utterance by providing positive evidence that he believes that he understands what the speaker meant by that utterance. Such evidence may take several forms: the addressee may continue to attend to the speaker, may produce a relevant new contribution, may provide explicit acknowledgement of understanding or may repeat the speaker’s utterance verbatim and so on. All of these forms provide different strengths of evidence for understanding. An addressee’s continuing attention may be weaker evidence of understanding than verbatim repetition. After

¹⁹² *Ibid.*, 13 December 1989.

acceptance, the next contribution to the dialogue may be made and an iterative process of presentation/acceptance takes place.

It might perhaps be felt that if two disputants differ as to their ranking of values, persuasion would be difficult, if not impossible. Since the value order does not affect the acceptability of such arguments, persuasion should be possible with respect to them, even against a background of different value rankings. What is true, however, is that a persuasive dialogue must be directed towards the value judgements of the *audience* not the *speaker*. It may well be, therefore, that the speaker may have to offer a line of reasoning which he does not himself find persuasive in order to convince his audience. This need not, however, compromise sincerity, since he will independently believe his claim by his own lights. Nahas Angula was non-committal on the question of the death penalty, but for different reasons:

I just feel incompetent to decide on that myself. I think we need to consult a broad spectrum of the ... (inaudible). If we provide them with a fait accompli about the death sentence, I am not sure whether we are truly and fairly reflecting the society's desires and expectations. I don't know what the implications would be. But there must be provision. So, as much as I don't like capital punishment, I will also not be in a position to say no capital punishment in the law. I feel incompetence to do so.¹⁹³

Argumentation plays a key role in finding a compromise during a negotiation. Indeed, an offer supported by a good argument has a better chance to be accepted by one party. Argumentation may also lead a negotiator to change his goals and finally may constrain him to respond in a particular way. For example, if a negotiator receives a threat, he may accept the offer even if it is not really acceptable. Nico Bessinger, however, was explicitly for the death sentence and argued that it must be used discretionary:

There are occasions where an act perpetrated by an individual or individuals against society, that it provokes society to the point where, unless that death penalty is applied, it disrupts the function of society that as a whole, and that means that if the expression of society that the supreme penalty should be applied is oppressed and it cannot happen, it can lead to disaster...So, I say it

¹⁹³ *Ibid.*, 13 December 1989.

is something that needs to be there, but it needs to be used in a discretionary fashion. But if it is not there, it creates problems.¹⁹⁴

However, sharing information comes with a price. Each participant runs a risk when disclosing his or her desires and goals. If, for instance, one party believes that the negotiation is distributive, they will use any information disclosed by the other party to gain power. Therefore, if the parties do not take the time to discuss and agree upon the type of negotiation to use, it is likely that little information will be shared. The parties will fear vulnerability and not disclose important pieces of information. While information sharing is critical, it is nearly impossible to achieve if trust, a characteristic of integrative negotiation, is missing. Mose Tjitendero argued against death penalty saying that enough case studies that prove that death sentence is not a deterrent against crime.

I think if we were to be fair to ourselves as representatives, this is one of the issues that can be thrown out eventually on a referendum or whatever. But I don't think that there are sufficient grounds. I am inclined to believe that there are not sufficient grounds to maintain the death penalty in a contemporary constitution. There is just no basis for it. I think there are different ways in which human character can be reformed. By getting rid of the life you are not doing anything, the acts will still be perpetuated. So, in sociology there are different views of changing peoples' actions and behaviour through a model, but not through a death penalty, and I think I would like to agree with those who are advocating for the removal of the death penalty. It is not a deterrent at all.¹⁹⁵

The committee was divided. The integrative technique assumes that a lack of resources is the only reason for conflict. By obtaining more resources, parties satisfy their goals. This technique is only possible when additional resources are available, and parties must work together to collect those resources (Bazerman & Neale 1992). While this approach is simple in theory, it is difficult to do because additional resources do not always exist. Also, this technique assumes that parties' interests are not mutually exclusive, and the driving force for obtaining more resources is the desire to be able to continue working together (Neale & Bazerman 1991). If this technique is possible, it is an efficient way to achieve joint-gain without destroying

¹⁹⁴ *Ibid.*, 13 December 1989.

¹⁹⁵ *Ibid.*, 13 December 1989.

relationships. And yet, little relationship building occurs because only limited interaction is needed. There was need to find common ground on one of the most controversial issues during the drafting of the new constitution. Pruitt and Lewis introduced the concept of “flexible rigidity”. The essence of this concept is to be firm about fundamental interests and basic goals, to which one must be resolutely committed, while exhibiting flexibility about means of negotiating a solution to the problem. While this is a useful advance, it does not solve altogether at least two problems. On the one hand, where there are fundamental conflicts of interest, rigidity about basic goals may block progress altogether. On the other hand, flexibility in the negotiating process may be perceived by the other party as a sign of weakness that can be exploited to the other's benefit. Hartmut Ruppel introduced an element of flexibility in order to create common ground by proposing to leave the clause out of the constitution:

If the people so strongly feel that it should be in, it could be a debate in parliament in good time. There could be a referendum which could put it back for some reasons to be decided. But let's kick off on a nice note. Let's give human rights a chance and let's respect human life in our first document. We can always, for good and sound reasons and on debate and testing the feelings of our society get it back. That is my approach.¹⁹⁶

The treatment of negotiating flexibility is thus often a function of which paradigm one selects. Within the realist, flexibility is generally defined in terms of the willingness to make new offers and concessions and to avoid commitments or retractions. Put differently, flexibility may be viewed as the prevalence of soft over hard negotiation styles, that is, the dominance of converging behaviours compared with.

Another common integrative technique, logrolling, assumes that more than one issue is driving the conflict. Parties first provide a list of their issues and desires. Comparison of these lists helps parties discover that they have opposed preferences and values (Northcraft, Brodt & Neale 1995). Traditional logrolling assumes that parties have linear preferences and make calculated concessions in order to obtain important issues while giving away lesser valued issues (Tajima & Fraser 2001). The key here is that parties prioritise their issues differently and make appropriate concessions that result in a recognised willingness to concede on some issues in

¹⁹⁶ *Ibid.*, 13 December 1989.

order to maintain a working relationship (Pruitt 1981). This technique ensures that trade-offs make parties at least partially satisfied.

Members of the drafting committee had to find common ground on the powers of the president of the republic especially with regards to the cabinet. From the onset, SWAPO wanted an executive president while the opposition parties wanted a ceremonial president with a prime minister as head of the government. Fearful of a possible dictatorship, the opposition wanted the president to share powers with cabinet members. Barnes proposed that the president “act in consultation with” the cabinet.

I think we have to be very frank. We are not making this for ourselves, quite obviously. And I also want to say that when we are making these decisions, we must know that we are not even in the position in which our comrades were in Zimbabwe, where our colleagues from Zimbabwe were pointing to Lancaster House. This is a historic opportunity we have been given as Namibians to write this constitution ourselves, either to mess it up to take into account our actions that we are taking today, and I am inclined to think that we are thinking too much of the immediate environment. “In consultation with” is appropriate.¹⁹⁷

Once grounding has been achieved and a particular piece of information has entered common ground, both participants can refer to it freely and assume that it will be available to the other. In fact, both participants have access to two aspects of common ground, represented in an overall *discourse representation*. The first is represented in the component of the discourse representation that Clark (1992) terms the *situational representation*. This is the semantic component of common ground: the knowledge and beliefs that the interlocutors share. Addressees may also be influenced in their interpretation of the speaker’s utterances by their knowledge of what is available in the speaker’s situational representation. For example, an addressee may only interpret referential expressions with respect to referents that he knows are in common ground and not with respect to referents that are part of his privileged knowledge (Hanna and Tanenhaus 2004). Barnes argued that it was important that the president act on the advice of the cabinet because “in

¹⁹⁷ *Ibid.*, 13 December 1989.

consultation” doesn’t give a clear direction in line with the checks and balances that “we said was important for the good government function”¹⁹⁸. Ruppel did not agree:

...I think the more crucial one, and we are getting bogged down on some technicality, the principle is stated in paragraph 2 which is clearly stating the joint exercise. It says: “The executive power vests in the Cabinet headed by the president”, and whether you say here at the bottom “in consultation with and on advise” doesn’t make a big difference, because the executive function of the government vests in the cabinet headed by the president. So it is really splitting hairs, it is not going to make a difference at all.¹⁹⁹

The third approach to integrative negotiation, compensation, suggests that to achieve desired outcomes, one party pays off the other in return for acquiescence (Pruitt 1981). This pay-off is unrelated to the request, but satisfies the giving individual. Compensation assumes that parties can determine truly desired outcomes by the other party, whether it is part of the negotiation or not. If this is done, it is possible to satisfy both parties since one achieves his or her desired negotiation goals, and the other receives a benefit that allows for easy recovery. Moses Katjiuongua wanted an even stronger obligation to work with cabinet. He proposed that the president be “obliged to act in consultation with the cabinet”.²⁰⁰ He believed that that way,

...the president will take a decision only after consultation with the cabinet. When you are obliged to somebody, it means you must take their advice, and if you say “advice” it is not good for his dignity.²⁰¹

Eric Biwa weighed in:

For the sake of record, I would also like to say the following: I would have liked to have an explicit requirement that the president is advised by the cabinet and he is obliged to follow that advice. Now, as it stands here he is obliged to consult, but he is not obliged to follow that advice. He is merely obliged to inform on his actions and he has the right to proceed with that action, even if that action is not approved by the cabinet. Still, he will remain within the framework of the constitution ... (inaudible) does not say that he

¹⁹⁸ *Ibid.*, 13 December 1989.

¹⁹⁹ *Ibid.*, 13 December 1989.

²⁰⁰ *Ibid.*, 13 December 1989.

²⁰¹ *Ibid.*, 13 December 1989.

must be advised and should take that advice. It only says that he is obliged to consult. He can consult and proceed.²⁰²

Biwa's approach fits with the cutting costs approach proposed by Pruitt (1981), which assumes that a party will accommodate the opposing party if costs associated with negotiating are limited or eliminated. It requires that each party know the other well enough to suggest cost-cutting strategies that are important to each. The party who desires to achieve their objectives must develop a plan that aids in the cutting of costs for the opposing party. This plan ensures that the opposing party is less affected by the time and energy used in negotiation. Although the shared cognition perspective is highly valuable to an understanding of negotiations, social identity theorists argue that negotiations are also influenced by the way negotiators identify with the social group(s) at stake (Oakes, Haslam and Turner 1994). As Eggins and others (2002) have argued, a negotiation can be seen as a communication process in which multiple social identities are at stake especially when negotiators represent a particular party or viewpoint. Their research further demonstrates that the extent to which negotiators identify with their own party and the negotiating group as a whole mediate the outcome of the negotiation. This idea is central to many recent perspectives on the management of (inter-group) conflict, which argue that a balanced expression of both identities is required to resolve inter-party disputes (Eggins *et al.* 2002). Thus, if a negotiation is ever to be successful, the different parties should establish common ground in the form of an overarching common identity in addition to their subgroup identities.

Rhetoric of needs and desires

A number of political theorists have argued the importance of deliberation to democracy and the need for a norm of consensus to govern such deliberation. John Rawls and Bruce Ackerman stress the urgency of such consensus particularly in deliberation of constitutional matters, those of most fundamental concern to a polity. Serious public debate of constitutional questions necessarily runs the risk of rhetorical vehemence, of mutual castigation by adversaries. It is true to say that to some extent, the constitutional symbolism of the Windhoek Assembly debate captured the collective political imagination of the time. This is not to mean that the

²⁰² *Ibid.*, 13 December 1989.

mere invocation of the word “constitutional” engineered some occult change in the texture of political debate – that it magically transformed self-interest into collective interest, national or sectoral public goods into a Namibian public good, arms-length negotiation and compromise into deliberative rationality. The idea of a Constitution as a founding or transformative event is deeply inscribed in the modern political history, affected the terms on which and the enthusiasm with which at least some of Namibia’s political classes engaged in the constitutional debate. Each side had intended to affect, either positively or negatively, the system and its capacity to provide a machinery of government which is fair and responsive to diverse demands, is mindful of citizen rights and is capable of delivering effective resolution and implementation of policy. They sought to provide both synoptic representations of the type of political community to which they referred and a standard to which the political community should aspire. Perhaps this typology can be explained better with Lyotard’s notion of “*Diffèrend*”. Lyotard has written that what is at stake in a literature, in a philosophy and in politics, is to bear witness to *diffèrends* by finding idioms for them. By the term *diffèrend*, he means a case of a conflict, between at least two parties, that cannot be equitably resolved for lack of a rule of judgment applicable to both arguments. Lyotard’s focus here is on the construction, understanding and resolution of conflict. In cases where conflict-resolution may produce a *diffèrend*, it is important to note how the resolution which takes place between parties differs from a mere “litigation”, in that in the former, the “regulation” of the conflict that opposes them is done in the idiom of one of the parties while the wrong suffered by the other is not signified in that idiom. When a *diffèrend* occurs, the discourse of one party is excluded from the outset, for it is foreign to the genre of the tribunal. The claims of this party will be dismissed without even recognising them. Lyotard’s notion is that as long as the discourse of the tribunal holds sway, nobody will even recognise the wrong (*tort*) done to the losing party, who becomes for this reason a victim. A *diffèrend* is therefore an implicit tie that has not been realised with a victim that has not been recognised.

The fulfilment of desires and needs is stronger in the context of bargaining. Gilles Deleuze (1977) speaks of the “nomadization” of politics in a society where the face of the enemy perpetually changes. Foucault believes that “the relationships between desire, power and interest are more complex than we ordinarily think, and it is not necessarily those who exercise power who have an interest in its execution;

nor is it always possible for those with vested interests to exercise power” (1977: 215). Desire will persist in all its varieties till desire transmutes itself into something other than itself. As Nietzsche says, it is “our needs that interpret the world; our drives and their “for and against” (1967: 267). Yet, our lust to be and our imperatives of power are themselves mediated by structures, some cosmic and slow-changing, others cultural and labile. Creating common ground, thus, requires each side to identify each other’s interests. This will take some work by the negotiating parties as interests are often less tangible than positions and are often not publicly revealed. A key approach to determining interests is asking *why* each side wants what it proposes. As stated elsewhere, some members of the drafting committee opposed continued reference to apartheid in the constitution. Mudge recognised that the nation emerged from an history of racial discrimination and could not imagine a new government going back to the policy of apartheid:

Frankly, I think it is a past era. It is over and out. But if we have a democratic society, then...you must allow freedom of speech and we must not allow past experience although I agree we cannot forget the past. I don’t expect you to forget the past, and you can even talk about the past. It is just normal. But throughout the document we find reference to, according to my feelings, too much about that. If anybody wants to propagate anything which is ridiculous, but which is not a threat to the security of the state, for God’s sake, let them do that. What can we do about it? We will not go with them. There will be other people propagating other things which we will not like, and my problem is if we start specifying, where do we stop?²⁰³

Mudge had little information about what other parties wanted. Even fellow minority party delegates felt compelled to side with SWAPO delegates that somehow, the constitution must recognise that the country suffered under apartheid. Katjiuongua argued that in all the constitutions of independent countries, the question of tribalism has been addressed by all of them, simply because they want to create a nation and they want to free the people from tribalism.

In our context apartheid is part of our context apartheid is part of our problem and fascism is part of apartheid. So therefore I feel that these things which are part of our history or problems, we cannot ignore them. Other things, we leave

²⁰³ *Ibid.*, 13 December 1989.

them out. If we need to make amendments in future to include them if they become problems, then we do so.²⁰⁴

Despite the obvious prevalence and importance of negotiation, substantial evidence suggests that people often fail to attain readily available and mutually beneficial outcomes. Many negotiation situations contain potential for joint gain, which are known as *integrative* negotiations. The Windhoek Assembly negotiated over inefficient offers and end with an efficient compromise. This meant that the parties considered offers which they could have never chosen. The inefficient offers and end with an efficient compromise refers to the parties' strategies and tactics rather than to their objectives and utilities and to the structure of the negotiation problem. It suggests that if one faces a distributive negotiation and proposes offers that are very "bad" for both sides, then such a negotiation becomes integrative. Paradoxically, stating that integrative negotiation produces efficient offers equates them with the "win-lose" description of distributive negotiations. A strictly efficient offer is, by definition, one that if there is another offer that produces gains only for one party it must also produce losses for the other party. Hence, an efficient offer creates a win-lose situation that is typical for distributive negotiation implying that there is no analytical difference between the two types of negotiation. Another and related view of integrative negotiation is that it must end with an improvement of the parties' situation. It makes no sense for the parties (unless they are forced to negotiate) to engage in a time consuming process without an expectation that it would improve their situation. A similar argument may be made regarding the reservation values. Moreover, since the reservation values correspond to the offer that is unacceptable, it is obvious that the compromise has to dominate this offer.

Kosie Pretorius was a strong proponent of group rights to which most black delegates and even perhaps some whites were opposed. As such, any discussion of group rights was viewed – rightly or wrongly, with suspicion. They feared that group rights would allow a situation where there would be whites-only schools or whites-only hospitals as an exercise of the right to cultural minority. Pretorius allayed the fears that "I will not use this article to justify it"²⁰⁵. Dirk Mudge was not so convinced:

Let me start off by saying that when you talk about discrimination in Namibia, it has a different connotation when you talk about discrimination in another

²⁰⁴ *Ibid.*, 13 December 1989.

²⁰⁵ *Ibid.*, 13 December 1989.

country, say for instance Japan. When you talk about group rights here, when we discuss the protection for minority rights and group rights in this country, we must do so against the background of our own experience. Let me say that not only the black people had bad experiences with group rights, as a white man I had bad experiences with this concept of group rights, and for that reason I am not opposed to discussing it. We can discuss it, but I will never agree with it. I personally feel that if you protect the individual, you are also protecting the individual in association with other people. Then you have to deal with groups that are voluntarily formed, but when you start defining groups, the way it is done in ACN's proposal, then they put me before the choice either to be a member of the group or not to be a member of anything at all, and then I am in trouble. But I don't want to go into detail.²⁰⁶

The second aspect of common ground, which is represented in the textual representation, relates to the linguistic means that have been used in the dialogue to establish that knowledge and those beliefs. Thus, the textual representation constitutes a linguistic record of the utterances that each speaker has produced in the dialogue so far: the words and structures that have been used, their prosody, and so on. Some of this information may not be retained for long in the textual representation. For example, people are notoriously bad at remembering utterances verbatim (Jarvella 1971; Marslen-Wilson and Tyler 1976). But other information, such as the particular word that a speaker used to refer to an entity, may be retained for the duration of the dialogue (Horton and Gerrig 2005). In the illustration above, the word "discrimination" was retained by Mudge as a textual representation.

Integrative or "interest-based" bargaining is a form of negotiation in which each party attempts to understand the other's interests, on the expectation that it will achieve a better result by helping the opponent create a solution it sees as responsive to its own concerns. Deliberative democracy is focused on the circumstance in which a group must make a decision to which all members are bound whether they agree with it or not. Although even political deliberation can have various purposes, its essential aim is to reach a binding decision. From the perspective of deliberative democracy, other purposes - such as learning about issues, gaining a sense of efficacy or developing a better understanding of opposing

²⁰⁶ *Ibid.*, 13 December 1989.

views - should be regarded as instrumental to this aim. Not only was Mudge trying to point out specific concerns about the article, he also wanted general agreement:

I am afraid the word “discrimination” has got a specific connotation, something which is wrong and I cannot agree that you can qualify discrimination. As far as I am concerned, discrimination is discrimination - unless you find a better word. I am not saying this only because of the connotation; I am also saying this because I know why Mr. Pretorius wants those words in there. We have discussed it before. He maintains that if he has a school in which he wants to educate people in a specific culture and tradition and language and religion which, in the end, will boil down to racial discrimination, he will be able to defend it on the grounds that it is not discrimination, but in fact differentiation, or something like that. If we really want to have peace in this country, then we must avoid making provision for any form of discrimination.²⁰⁷

After interests were identified, the parties worked together cooperatively to try to figure out the best ways to meet those interests. Often by listing all the options anyone could think of without criticising or dismissing anything initially, parties came up with creative new ideas for meeting interests and needs that had not occurred to either party before. The goal was a win-win outcome, giving each side as much of their interests as possible, and enough, at a minimum that they saw the outcome as a win, rather than a loss. However, such tasks where people had to collaborate could not be the only context in which shared cognition plays an important part. In negotiations, a lack of common understandings among participants is an important reason for failure to come to an agreement. Thus, it would seem that shared cognition could also play a role as facilitator of negotiations. The exact relation between shared cognition and productivity may depend on the type of negotiations studied. For example, during negotiations characterised by a symmetrical structure of interests where all parties want exactly the same, shared cognition may provide a better understanding, but the attained outcome is very likely to be sub optimal (Carnevale & Pruitt 1992). Therefore, shared cognition is unlikely to contribute to productivity in any straightforward fashion. The scope for shared cognition to make a difference is much greater in those negotiations with an asymmetrical structure of interests. In this type of negotiation, it is possible to make trade-offs by the principle

²⁰⁷ *Ibid.*, 13 December 1989.

of logrolling, allowing the development of win-win agreements, in which both parties accomplish their major goals (Carnevale & Pruitt 1992; Pruitt & Carnevale 1993). So, an integrative negotiation provides the opportunity for a group negotiation outcome to be productive without harming individual outcomes. In integrative negotiations, shared cognition as a common understanding of each other's problems and possible solutions would seem essential ingredient of reaching the maximum joint outcome. Thus, in integrative negotiations shared cognition may be a key predictor of group productivity.

It is generally accepted that if two or more parties with conflicting interests wish to resolve the issue because they perceive it to be to their mutual benefit, they commit themselves to bargaining. In the bargaining process each party tries to maximise its gains and minimise its losses (Berkovitch 1984: 126-128). This creates the so-called bargaining problem, that is, whereas bargainers need to reach a settlement, they also prefer one that is most favourable to them. The mixed-motive nature of bargaining is expressed in the fact that "if they had no incentive to cooperate, they would not bargain at all; if they had no incentive to compete, they would not need to bargain" (Bacharach and Lawler 1981: 4). Given this mixture of competitive and cooperative motivation, the problem lies in determining the exact outcome of any bargaining process, given the range of possible agreeable outcomes within the contract zone (Roth 1979: 1).

The issues surrounding the "politics of negotiation" in Namibia were complex and wide-ranging. The conflict originated with a dispute over a constitutional formula on which all parties could agree. One of the sticking points at the Windhoek Assembly was the powers of the president with regards to assenting of the bills passed by parliament and what happens when parliament re-passes the bill after the president had declined to assent. Mudge sought to ensure that the president does not abuse his powers to dissolve parliament:

We did not want the president to dissolve the government for any other reasons than those of time or when the country becomes ungovernable. The problem that we have, I am not concerned with article 55 because you must always read the two articles together and it is a fact that he can only do it if the government is unable to govern effectively. I remember the honourable member Mr. Rukoro made a suggestion there that we should put that more clearly and not only say "become ungovernable", but it should be because of

a major constitution crisis. How do you in any case define a major constitutional crisis? I think it is a practical problem. The question I want to ask, what is a government? You know, you can have a problem because the cabinet cannot function properly and there might be nothing wrong with the Assembly. In that case I suppose the Assembly can move a motion of no confidence in the cabinet, am I right? I think we have that provision. Why should we allow any president to just dissolve a government just because he wants an election? And if we must then in the case of a major constitutional crisis, then we must make sure that we can define that problem. I am not sure we can. A last point: what happens to the president in case of the government being dissolved? If he also must go it is another check that he wouldn't do it easily. But can we discuss that point now or must we discuss it when we come back to the point, the election of the president? I think that is about the only provision that we can make for power not being abused.²⁰⁸

The integrative bargaining process involves both concession-making and searching for mutually profitable alternatives. Simply stated, it enables negotiators to search for better proposals than those explicitly before them. From this perspective, negotiators are viewed as partners who cooperate in searching for a fair agreement that meets the interests of both sides (Bartos 1995). Some common integrative bargaining techniques include clear definition of the problem; open sharing of information and exploration of possible solutions. This approach encourages the generation of, and commitment to, workable, equitable and durable solutions to the problems faced by the parties. The preferred outcome of this model is one of maximum joint gains. Bearing this in mind, the proposal was that the president will also have to resign within a certain time and he will have to call elections for both a new legislature and a new president. That is how the constitutional deadlock was proposed to be remedied. Vekuii Rukoro took the floor to oppose the proposal but also to offer a counterproposal.

The president may dissolve the National Assembly in, instead of three, we say two ways. The first one is acting soloist, article 34(2) (a). My understanding of that is that he can do so in two ways. The first one is, for instance, to specify so that there can be no loopholes for abuse, that the president can resort to

²⁰⁸ *Ibid.*, 18 January 1990.

this power in order to resolve a major constitutional crisis which materially affects the ability of the government to govern effectively. It is deliberately phrased in a general way because we cannot foresee all the types of constitutional crises that may come up. That will exclude this thing whereby he can dissolve because it is a good year for him. Secondly, I think the president can act under this power for the ordinary dissolution of parliament after four, five years when the term of tenure is up. That is the only possibility for him to act under this article. The second and final authority under article 48(4) is stipulated in the DTA-draft, is what we talked about earlier on, namely the vote of no-confidence by parliament and the prime minister advises president accordingly.²⁰⁹

In addition to public-spiritedness, the reasoning must show respect to the participants and their arguments, even if it challenges the validity of the claims. In mutual justification, deliberators present their arguments in terms that are accessible to the relevant audience and respond to reasonable arguments presented by opponents. The requirement of accommodation means that the reasoning must keep open the possibility of cooperation on other issues, even if the deliberators do not specifically propose alternatives or initiate collaboration. Equal participation requires that no one person or advantaged group completely dominate the reason-giving process, even if the deliberators are not strictly equal in power and prestige. Barnes held the view that the argument of Rukoro would have been very logical if the president was elected by the Assembly as a member of the assembly. Only then would the consequences would have followed to its logical consequences that if parliament is dissolved, he is dissolved because he is there by virtue of his election by parliament. Barnes made two specific points:

We are dealing with an issue where we want to use the democratic process to bring something that is not completely democratic by avoiding an election. It can be argued that the 1982 Principles does provide for that, but the electorate out there was under the explicit impression that they are voting for a constitute assembly that will draft a constitution. With these two things in mind I further submit that the conflict situation that we will have to resolve is to

²⁰⁹ *Ibid.*, 18 January 1990.

draft a constitution for an interim arrangement with a final solution to an independent state.

How do we influence each other through communication and how does this affect the outcomes of group behaviour? First posits that we have to develop a common and accurate understanding of each other in order to attain outcomes that are satisfactory to all group members involved. The second approach advocates that the degree to which we feel part of certain social groups is decisive for the outcomes of our behaviour. When considered alone, each approach appears to be supported. However, they both tell only one part of the story and do not mention the fact that the two approaches may influence each other as well. It is argued here that in order to get a more complete understanding of social influence, a common ground is necessary. The process of creating common ground was itself not free from conflict if Hamutenya's call for a point order is anything to go by:

I think Mr. Barnes is now out of order. He is now taking to other issues. What he has just said definitely is out of order. We are drafting the permanent constitution of Namibia.

This response by Hamutenya seemed to have infuriated Barnes. Aristotle asked the question: Even when angry rhetoric would appear to be a reasonable, morally appropriate response, is there a way in which rhetors might manage anger in their public discourse in order to achieve ends which are both morally and pragmatically productive? The answer lies in non-angry rhetoric, which involves transforming and reflecting upon anger in public discourse. Because such rhetoric often promotes noble ends such as reconciliation and forgiveness, it is at least morally permissible and more likely morally virtuous. Barnes took leaf out of this theory:

I was not out of order and I should be afforded the opportunity to prove that I was not out of order. That is democratic. The mere fact that I referred to a particular thing was under the assumption that you said cross reference we might be made and I assure you, that is what you have said. If I have then acted in good faith on the arrangement of ruling that you made, I was not out of order.

As the philosopher of rhetoric Eugene Garver says, the particular passions Aristotle chooses to explore in the *Rhetoric* serve a role necessary for the kind of public, political decision making Aristotle assigns to rhetoric. These emotions serve to integrate - or segregate, as the case may be - "distinct individuals into a deliberative

or judging body, or *demos*" (1994: 131). While there are times when individuals seem to deserve our angry rhetoric, it may not be justified from a broader moral perspective, especially when the goal is the good of the state or the community - especially if angry rhetoric leads to the violent dissolution of democratic community. As negotiators have to draw on shared norms to justify their positions in an arguing process, arguing might be more common as well as more successful, the denser the network of common knowledge and shared norms among the delegates is. The normative interpretation of the "democratic peace" theory claims that it is that shared background that makes democracies particularly averse against entering armed conflict against each other, as they recognise each other as directed by the same set of cherished norms (Risse-Kappen 1995). In this case, dissolution of democratic order was not desirable because angry rhetoric hinders or assists individuals living, working and deliberating together. Geingob recognised this when making a ruling whether Barnes was in fact out of order: "In good faith, you are out of order because you are bringing something we have already agreed upon."²¹⁰

Zagacki and Boleyn-Fitzgerald (2006) write in *Philosophy and Rhetoric* that the Old Testament is filled with many examples of a God and other Biblical characters discoursing angrily in order to achieve moral ends. However, Aristotle was one of the first to deal systematically with the relationship between anger, rhetoric and virtue. In Book 4, Chapter 5 of the *Nicomachean Ethics*, he concedes the difficulty of coming up with a "formula" for recommending when and how angry a person ought to get. Nevertheless, Aristotle supplies what might be construed as a topology for morally appropriate angry rhetoric, claiming that the virtuous person gets angry only in the manner that reason instructs, and at those people and for that length of time: "what deserves praise" is that we "show anger at the right person, on the right occasion, in the right manner, and so forth, while the extremes and deficiencies deserve blame" (1126b 5–10). Hamutenya exhibited some anger in reply to the opposition parties that appeared insistent on a ceremonial president, which SWAPO strongly opposed:

In their documents they called it ceremonial, the same thing. So we know that the question of how the president is elected hinges on those basic propositions to begin with because his wings must be clipped. That was the

²¹⁰ *Ibid.*, 18 January 1990.

essence of the construction. In recognition of that fact we went through the exercise to curtail the powers, as my colleague Mr. Angula has just indicated. We on our part were saying we are interested in checks and balances, properly understood, not only the fiction of it. We were saying there will be a legislature directly elected by the people with its specific mandate to make laws and then we want an executive with its contrary mandate not an extension of the other organ of the state, to administer the country, to execute policies. So we wanted that balance to be established and that is what we have been fighting for all along. So we can continue to do that and that is where we are now. We are asking that in the light of the quid pro quo which were made. We gave you two things. You gave us one. Please give us that other thing in essence not only in appearance.²¹¹

In the *Rhetoric*, Aristotle tries to explicate the causes of anger, the state of mind of those who become angry and those at whom people become angry. Emotions like anger are important to Aristotle's theory of rhetoric, although it is important to understand that there is a distinction between the emotional state of anger and angry rhetoric. Angry rhetoric, however it is performed publicly, tries to evoke anger in one's audience, as Aristotle himself demonstrates. Once evoked, anger has enormous implications, significantly altering both the spatial and temporal framework in which audiences see the world. Aristotle recognised that the pleasure of anger derives from the way people imagine how in the future their anger can be appeased. The delegates at the Windhoek Assembly exercised caution, however, even as they believed to have justified anger. Calmly but deliberately, Ben Amathila spoke about the desire to reach common ground:

We deferred this matter yesterday because of an intervention by Mr. Mudge. Having had all the explanations given, again this morning upon the request of Mr. Mudge, I think we have a chance of making shortcuts in settling this issue because I think satisfactory explanations have been given and the relationship between the election of the president vis-à-vis the various powers and functions that we have been discussing the whole day. It would therefore be possibly important to invite the house, and Mr. Mudge in particular as to whether satisfactory explanations have been given in the issue we have been

²¹¹ *Ibid.*, 19 January 1990.

discussing since yesterday. It is true that the wheel has been invented once for those who want to use the wheel, not to reinvent the wheel every time they want to use the wheel. It is equally true that the first wheel was probably made out of stone or wood and it didn't have a bearing, a...bearing to make it last longer. Therefore, maybe our experiences from place to place, country to country and state to state call upon us pay attention to our own situation. I am trying to say that in an effort to try and find a sort of local satisfaction for the president we are going to have, it will not be a run-away president; it will not be a person which will trigger our minds, given our past experiences what happened in countries in the neighbourhood or somewhere else. It would appear to me that it is very important as well for us to realise that the president we are trying to create will reflect the aspirations of this young nation which will be launched in the international community from which we have been denied access to, and the type and the dignity of this president has to be seen in relation to the task entrusted to him in relation to other presidents. We should not clip too much off his wings. Then we are obviously going to find the launching of this nation into the constellation of nations rather difficult.²¹²

Aristotle offers little obvious advice in the *Rhetoric* about when it is *morally* advisable to employ angry rhetoric in public discourse, although he does suggest practical ways for a speaker to “put his hearers . . . into the right frame of mind” with regard to certain issues and the speaker’s persuasive intent (1378a 15–16). For Aristotle, the problem of angry rhetoric seems closely connected to ethos or the character of the speaker. However, once again he offers little specific advice about the role anger might play in constituting the ethos of the orator, although we can speculate, given Aristotle’s discussion in the *Nicomachean Ethics*, that an orator who does not respond angrily when appropriate may give an audience reason to question the speaker’s goodwill, character or his sense of *phronesis*. Perhaps, we can find clues to the process in Tjiriange’s contribution to the debate:

Ladies and gentlemen, I think we have debated enough. There is nobody who can add new ideas to this debate; we just have to take a decision. We are for the directly elected president. We are very much convinced that this is the

²¹² *Ibid.*, 19 January 1990.

most democratic way of going about things. We have been talking about democracy here. Let the people decide for themselves whom they want as their president. We are asking no more, no less. We just want democracy to prevail. Let the people find their own leader. This is what we are requesting and I think all of us are democrats here and we cannot afford to frustrate democracy.²¹³

Threats and promises are two faces of the same coin in that the same argument can be cast either in the form of a threat or of a promise. Threats and promises affect the behaviour rather than the belief structure of a persuadee. They are used, in general as a last resort, when reason fails. The effectiveness of a threat (promise) hinges on the power of the persuader to control the contingencies mentioned in the threat (promise). A threat (promise) is self-justified and does not need any extra justification. Because people want to satisfy their goals, threatening an important goal of a persuadee is the most effective of arguments. Aristotle's argument imagines one motive for avoiding anger or angry rhetoric and then suggests that all individuals who avoid them have that motive. Aristotle is right that one might be motivated to avoid anger or angry rhetoric out of a slavish sentiment. Dirk Mudge knew that there is was no way left for him to convince SWAPO otherwise. He also accepted that it will not be in the interest of negotiations to continue pursuing a line that will further alienate some moderates in the assembly:

I agree with the honourable member that I think this discussion and all the arguments are more or less exhausted now and I am convinced that I will not even in this last contribution or intervention from my side will be able to persuade the majority. It doesn't mean that I have changed my mind. I also agree, and I am sure I represent my party, that we are in favour of a president being elected by parliament. We will reserve our right to speak in the assembly as far as this point is concerned. As democrats of course we will accept the outcome.²¹⁴

Institutional settings do not only provide different degrees of reference points enabling the triadic structure of arguing to play itself out, they also vary with regard to the (public) audiences, who can listen to the argumentative exchanges of the speakers. That was why Mudge voiced his eagerness to speak in the assembly

²¹³ *Ibid.*, 19 January 1990.

²¹⁴ *Ibid.*, 19 January 1990.

where he could speak without the restrictions of the committee being imposed on him. Elster (1991) has pointed out that public discourses tend to have a “civilizing effect” on the participants in the sense that explicitly selfish interests can rarely be defended and justified in the public sphere. At least, actors have to pretend rhetorically that their interests serve the common good. Once universalistic claims are made in a public discourse, though, other speakers can weigh in and challenge the arguments as self-serving. On the other hand, Checkel (1999) claims that based on insights from the literature on persuasion, that arguing geared to a reasoned consensus is more likely in private in-camera settings and behind closed doors given the considerable risks which actors face when they expose their interests or even identities to arguing. Thus, arguing in front of a public would rarely result in a true dialogue, but more likely lead to ritualistic rhetoric and purely strategic arguing. Both claims might be correct, but depend on the institutional context of the negotiations. In the case of legal reasoning in front of a court, for instance, the civilising effects of an audience weigh heavily on the speakers even if they are strongly motivated by instrumental concerns. The point here is that judges and juries are obliged to be impartial and to decide about the validity of the arguments of the speakers. In contrast, arguing in front of an audience often results in ritualistic rhetoric and symbolic mobilisation, because the speakers’ main purpose is to rally their own constituencies behind their positions and rhetorical performance criteria are at least as important as the ‘power of the better argument’. Mudge seemed to grasp the full extent of what history will say:

But Mr. Chairman, because the records of this assembly and this committee will become very important in future, I will very briefly and to the point make a few remarks for the record. First of all, our party proposed a ceremonial president. We have accepted an executive president because what we have now and will have will not be ceremonial president. There is no doubt about that. You have agreed on a number of restrictions. When you go back and look at the draft, you will find that those restrictions or whatever you might call them, clipping of the wings of the president, mainly boils down to the confirmation of a small number of appointments. I don’t think for the rest that we have really clipped his wings. On the other hand, I also want to put on record that our party wants the government, the ruling party and the president to rule effectively. So, in a way we are happy that the majority is such that the

government can rule effectively. Otherwise it could have been a problem...I think that we have come together in a spirit of co-operation and goodwill. We have a tremendous responsibility towards the future generations and for that reason it was necessary that we discuss these issues – properly discuss them without fear, without hesitation to express our views because, Sir, history will judge and future generations will judge who were right and who were wrong. For that reason, I thought it necessary to put these things on record.²¹⁵

Whether or not you agreed with him, Mudge was able to articulate his position clearly. His abilities may have served him well. The key to successful arguing is how a speaker is perceived by the audience. There are certain strategies with which actors can gain the status as credible speaker. It does not suffice that actors claim to hold legitimate knowledge, but have to prove that the way they acquired this knowledge meets certain criteria of validity and can be shared inter-subjectively. Moreover, as other studies pointed out before, knowledge brokers must be perceived as honest and impartial or dedicated to a cause which is looked upon as being legitimate and in the interest of some common good. For persuasion to be effective, the appropriate type of argument has to be presented in each situation. An argument's convincing power derives from the strength of its justification. A justification does not always have to be explicit for the argument to be effective. A justification does not even have to make sense for an argument to be potentially persuasive. It suffices that the justification sounds plausible. Whether or not a justification is plausible depends at least partly on the conventional sources of persuasive arguments for the domain.

The mixed-motive nature of rhetoric

When common ground is reached, goals may have regulated arguments in several ways. Arguments focus on two (or more) persons' views about the worth of accomplishing incompatible goals. SWAPO and the smaller parties recognised that they had a goal conflict and that both of their goals could not be attained at the same time. If either party was unaware of the conflict, an argument could not begin. If mutual recognition occurred and the two parties sought to resolve their conflict by defending and advancing a position, then an argument could be pursued. Arguers

²¹⁵ *Ibid.*, 19 January 1990.

almost always enter a negotiation with the goal of persuading their opponent of the worth of their stance, especially at the beginning of a negotiation. They believe that their position is better and more valid than their opponent's. Consequently, the frequency of overt justification and explanation of goals and stances is high in arguments. There was recognition that each party has a role to play in order to reach agreement on the dissolution of parliament. Interestingly, the dissolution of parliament was linked to the proposed position and functions of prime minister. The DTA led by Mudge were not committal to the proposal:

Mr. Chairman, it is not possible for our delegation here to finally make a proposal, we have to discuss it with our caucus, but the feeling among us here is that we might agree to amend our proposals in so far as the position of the prime minister is concerned. We make provision for a cabinet with the prime minister as the chairman of the cabinet. In your case the president will preside at the meetings of the cabinet. We do not have authority to as this point in time make concession there, but we have the feeling that there we might be able to make a concession. The main difference, I would say between our proposals and the working document, A.1, is the fact that we make provision for the prime minister and a cabinet which will have to be approved by parliament. It will not be in the sole discretion of the president to appoint the prime minister and the members of the cabinet. It will not be in his sole discretion, it will have to be approved by parliament. In other words, that will have to discuss and secondly, we make provision or we qualify the powers of the president by bringing in the word "on instruction". It could also be "on advice". That will not really make any difference, it is the same thing. We just have to keep that in mind.²¹⁶

Mudge tried to appeal to the *status quo*. The strength of this justification comes from the fact that, unless there exist strong evidence to the contrary, people tend to extrapolate the present. This form of justification is common when one argues about future events. Negotiations have several critical characteristics (Thompson 1990): communication is open and interactive, intermediate solutions are feasible, parties can make temporary offers and counteroffers and an agreement is not reached before all parties accept a proposal. The basic challenge in integrative negotiations

²¹⁶ *Ibid.*, 18 January 1990.

is the mixed-motive nature of the task. Negotiation implies tension between the creation and claiming of values (Lax & Sebenius 1986). The parties have incentives to cooperate in order to increase the size of the total pie. Typically, outcomes better than compromises can be achieved by making trade-offs across issues of differential importance to the parties. In order to make such tradeoffs, information exchange and joint problem-solving are needed. Simultaneously, however, the negotiators must safeguard against exploitation and secure a fair share of the value they created for themselves. This is achieved through distributive behaviour where they argue, focus on positions and ask for concessions. The tension between integration and distribution makes negotiations difficult and challenging. Therefore, negotiators frequently fail to reach high quality agreements that fully capitalise on the differences in priorities between negotiators. Motivational orientations and their interplay are here seen as potentially important causes of the process and outcomes achieved in integrative negotiations.

Use of precedents as counter-examples provides a strategy to convince a persuadee that his claim is not as tenable as he would like to think. The power of counter-examples lies in their ability to point out contradictions between the claimed and the actual behaviour of the persuadee. This was clearly at play at the Windhoek Assembly. Under all circumstances, SWAPO would not have the opposition parties “approve” members of the cabinet. SWAPO argued that its numerical strength was huge enough not to be treated like a coalition government where parties must seek the co-operation of others. Hage Geingob made the argument for SWAPO:

...I have never seen that you have to go and get permission for that. But on the other hand, if we are going to talk about where there is no absolute majority, where you have to co-opt and so on, it is slightly a different matter.²¹⁷

The persuasive power of these arguments depends on the importance of the goal that is claimed to be promoted by the adoption of the persuader's proposal. People will substitute the satisfaction of a lesser goal for a more important one. As stated elsewhere, common ground refers to the mutual knowledge, beliefs and assumptions of the participants in a conversation. During the conversation, common ground is updated in an orderly way, by each participant trying to establish that the others have understood their utterances well enough for the current purposes. A logical

²¹⁷ *Ibid.*, 18 January 1990.

consequence of the joint action perspective is that one of the primary roles of common ground is to act as the domain of interpretation for reference. However, while common ground ultimately does determine the appropriate context for interpretation, the timing of its effects remains an open empirical question.

There will be bargaining phases in any negotiation. Negotiators have to justify their preferred principles on normative grounds and this process requires the use and exchange of arguments. Bargaining cannot solve disagreements over fairness principles. To put it differently: A bargaining compromise over fairness principles will unravel immediately, when it comes to distributing the cake, while a reasoned consensus over what constitutes a “fair deal” is a pre-condition for solving the distributive problem. This can be elaborated by citing the discussion of 18 December 1989 on the size of Namibia’s new cabinet. Barney Barnes had proposed that the size of the cabinet should be determined by the constitution. He stated as follows:

The one thing that I think can we do to gain greater credibility for this government-to-be, would be to put in a clause on how many ministers there should be in relation to our country, the size of the population and in relation to the first government. I think it would give an image of maturity, an image of a responsible government. I don’t say it can happen, but in five years’ time some executive president may come to power and he would start with saying that he has a carte blanche to appoint ministers, and the Assembly being 72, he would have 69 cabinet ministers. We trust that this government will be a responsible government. I agree with my colleague that the prerogative rests with the president as far as the Cabinet is concerned. But if the constitution did say 15 ministers and 18 deputy ministers just as a guideline, it would just about round off a constitution that we believe will be in the best interest of the country and its people.²¹⁸

Peter Katjavivi did not think it would be necessary to determine the numbers in advance and should be left flexible for the president to determine. Theo-Ben Gurirab agreed that to fix a number in the constitution would be arbitrary, but thought

...a proliferation of ministries would not serve us well, they are very expensive. Some of you have experience in this, I don’t, and the mere creation of ministries would not serve the president’s interest and certainly those that are

²¹⁸ *Ibid.*, 18 December 1989.

members of the Assembly would be duty bound to advise the president if he were just to go on creating ministries to pay back his political friends and so on, that it is a costly business...I think the president should be advised that small things are beautiful.²¹⁹

Members of the negotiating group have joint interests related to the success of the partnership and potentially conflictive interests related to the allocation of burdens and rewards between the parties they represent. The mixed-motive nature of the tasks creates a dilemma for the group members (Lax & Sebenius 1986) regarding how to approach the negotiations. Some members may focus heavily on the competitive aspects of the negotiations and be motivated to only maximise their own gain. They may do so because they believe that the value of getting engaged in a partnership depends only on own gain. Other members may be inclined to focus also on the joint interests of the emerging partnership and are therefore motivated to maximise both own and joint gain. They may do so because they believe a viable partnership depends on values being created for all the partners. Thus, given that competitive and cooperative forces co-exists in many small group negotiations, we may expect members in small negotiating teams to be as likely to differ as to share motivational orientations (Brett 2001). When bargaining is repetitive, negotiators need to be concerned with their reputations (Raiffa 1982). A reputation for an aggressive or uncaring style might cause future negotiations to become distributive and hostile, while a reputation for a cooperative or friendly style might cause future negotiations to become more integrative. Valley *et al.* (1995) review the literature on how expectations of future interaction affect negotiator behaviour and conclude that reputations do indeed affect behaviour. In particular, negotiators who anticipate repeated future interactions with each other are more likely to trust each other, to feel more dependent on each other, to develop a working relationship, and generally to behave more cooperatively. Indeed, one lesson from Axelrod's (1984) exploration of the prisoner's dilemma is that one way to foster cooperation is to ensure a sufficiently long future of repeated interactions so that the value of defection today is outweighed by the value of continued cooperation. As Valley *et al.* emphasize, the utility of a single transaction often pales in comparison to the utility derived from a series of future interactions, and therefore, a negotiator may be willing to make large

²¹⁹*Ibid.*, 18 December 1989.

concessions in a current transaction because of an expectation of gaining back even more in the future.

A negotiator's concern for reputation also extends beyond the dyadic relationships negotiators have with each other. The current counterpart has friends and colleagues with whom the negotiator may later negotiate and with whom the counterpart may discuss the negotiator's bargaining style, honesty, cooperativeness or aggressiveness. Thus, it is wise for negotiators to value and cultivate their reputations so that future counterparts are not unfavourably biased against them. Any negotiation evaluation made on a stand-alone basis could easily miss these other values. The delegates were very much in agreement on a host of other matters. So much goodwill was generated on the 18 December 1989 to the extent that agreement was reached on a lot of subjects. At the end of the day, agreement was also reached to table the report to the constituent assembly. The relationship that was being developed is best captured in the intervention by Dirk Mudge and the response by Hage Geingob, chairman of the committee:

Mudge: Mr. Gurirab made a very important request and that is tomorrow there will be again silence after the report has been tabled. Isn't there a possibility of at least some of the leaders making a short statement, not long speeches, just saying that we have made progress and that we found the other guys not very unreasonable, just say something for the people outside because they are asking us. The alternative is that parties can afterwards issue statements. But I don't think that is the right way of doing it - if we could just have short, brief statements in the House.

Chairman: ...Thank you very much for your co-operation and also for wonderful participation. I think if this spirit is going to be maintained in the Cabinet and the Parliament of Namibia, we are going to teach the world a lesson. (Applause)²²⁰

The problem has been defined, participants negotiated a common solution. This was the actual bargaining phase of the negotiations where horse trading, package deals and other bargaining tools were expected to be employed. As a result, arguing and reason-giving receded into the background and had less effect than during the earlier phases of the negotiations. And while a coercive solution sharply contradicts

²²⁰ *Ibid.*, 18 December 1989.

the logic of arguing, it suffice to infer that the influence of finding common ground will describe the negotiation results as outright failure, agreement to disagree, compromise or consensus. This is to say that when two or more people come together to jointly solve a problem they contribute different perspectives and different areas of expertise. Different perspectives mean different goals, background knowledge and assumptions. Different areas of expertise often mean different languages for addressing the problem. Thus solving a problem jointly is both advantageous and difficult. On the one hand, the information processing resources being applied to the problem are increased, different viewpoints and skills overcoming some of the limitations of the individual.

It is a fact that public disagreement on constitutional questions is extremely uncomfortable and prone to rhetorical excess. It seems then that the institutional guarantee of free political speech rubs up against the moral imperative to resolve constitutional crises on consensual terms. In other words, when political disagreement is pervasive and must end in decisive victory for one side over the other, it stands to reason that the norm of dissensus (as opposed to consensus) is on shaky ground. Instead, public deliberation of contested constitutional questions tends to be governed rather by a norm of consensus. This illustration from a debate of 18 December 1989 makes clear the point above. The question arose whether the Secretary to the Cabinet must be a civil servant or a political appointee. Hamutenya argued that the Secretary to Cabinet must be a civil servant. This view was supported by Barnes on condition that the incumbent has to be appointed by the Public Service Commission. Tjiriange was not too sure:

I have no problem with that, but we have to take into consideration that in some places these people are almost like politicians. Take the case of Zambia, for example. The secretary is appointed by the president, and he is almost in the same position as the advisors of the president. He is a political appointee and he is like the ministers and so on. A civil servant will be appointed by the Civil Service Commission and be subjected to the rules of the civil service, but that is a political duty that he does in the Cabinet. I don't know I want to reconcile these two positions. He is a political animal.²²¹

²²¹ *Ibid.*, 18 December 1989.

People's attitudes and goals are strongly influenced by the groups to which they belong. They use the achievements of their peers as a standard with which to compare their situation and expectations. The Zambian example illustrates the point. The irreducible matter of judgment that lurks here is exactly when, under what circumstances, is it appropriate to be partisan, adversarial, independent-minded to put faith in institutions for resolving conflict rather than good will and sincerity and when to favour a norm of consensus that urges us to concur rather than simply defer to the outcome of an adversarial procedure. Reasonable political judgment, then, requires that we recognise the ramifications of constitutional debate. That means that we must understand the public consequences of invoking a deliberative norm of consensus.

One of the key differences between cooperative and contentious negotiating styles is in the nature of the underlying relationship. Whereas a cooperative negotiation style is founded on a communal relationship, a contentious style is founded on a transactional relationship. As a result, a cooperative style emphasises trust, whereas a contentious style emphasises power. However, trust is not simply a by-product of cooperation but also a pre-requisite for it (Pruitt 1981). Theoretical analyses of trust describe a cycle in which high initial trust elicits cooperation and cooperation in turn builds trust. Differing, yet similarly views shared by opposition and majority parties resulted in common ground: that it was necessary to have a Secretary to Cabinet who is a civil servant, nominated by president and appointment by Public Service Commission.

Conclusion

Common ground informs us that constitutionalism is based on the premise that for a constitution to be legitimate, it must have the support of the people. Without this legitimacy, there is less assurance that either the constitution or rule of law generally, will be willingly accepted and internalised. In order to achieve such legitimacy, new constitutionalism borrows from the ideas of democracy, to ensure that the populace is involved with the process of drafting the constitution. The promise of new constitutionalism can be clearly seen in post-conflict situations. By allowing opposing sides to come together and work together in creating their shared new constitution, and by assuring that all sides have ownership in the process, it enhances the new constitution's, and the new government's legitimacy.

Thus, four points, arising from the chapter, need restatement: first, in order to achieve collaborative solutions, participants must first understand that collaboration is voluntary. There should be no coercion used when establishing a problem solving team.

Second, collaboration requires parity between participants. Every individual should have equal opportunities during interactions.

Third, participants must recognise that collaboration is based on mutual goals. This recognition allows the stakeholders to focus on agreement rather than differences.

Fourth, stakeholders must understand that collaboration depends on shared responsibility for participation and decision-making. Information sharing is imperative because it ensures that participants have similar perspectives.

It is posited therefore that a powerful informal or cultural norm suggests to us that, with regard to constitutional deliberation, what is called for is not *partisanship* but *statesmanship*, not normal disagreement but the search for a common ground, a genuine expression of the popular will. Both Rawls and Ackerman have defended this statesmanship norm with elegance and passion. These theorists recognise and affirm the intimate connection between constitutional politics and deliberation to consensus. But there is also a connection between deliberative consensus seeking and rhetorical vehemence and vituperation. It is precisely the constitutional demand for statesmanship rather than partisanship that drives political oratory to the use of exclusionary invective, at least when there is actual disagreement among substantial numbers of negotiators.

CONCLUSION

The study focused on the rhetoric used during the drafting of the Constitution of the Republic of Namibia. The thesis offered a framework for understanding negotiation in terms of distinct and coherent rhetoric: Firstly, what reasons, grounds, justifications or explanations either in support of or in opposition to, some claim or position were provided? Secondly, what rhetorical distributive bargaining devices were applied during the negotiations for Namibia's Constitution? Thirdly, how did the application of common ground during the negotiations for Namibia's Constitution affect the outcome? Fourthly, how did the parties use the rhetoric of compromise during the constitution-making process?

The study reveals that, with very few exceptions, most of the debates of the Windhoek Constituent Assembly were initially built on argument and many of them were solved through practical reasoning. This can be explained in part by the attitude of the members and in part by the constraint of the process. On the one hand, many members were sincerely seeking to reach integrative solutions. Most of them agreed that the very *raison d'être* of the body of which they were members was to bypass the shortcomings of the past and they were inclined to try and overcome divisions based on misunderstandings, prejudice, ideologies or interests. On the other hand, the process put them under pressure. The variety of their views and the unpredictable nature of many issues, made a logical approach very difficult in most instances.

The study also reveals that the informative role of deliberation helped the framers of the Namibian constitution to form a more complete set of preferences than they originally had or even forced them to change positions when they were exposed to the full consequences or incoherence of their original proposals.

The study shows that when political actors needed to justify their proposals, they found that impartial arguments were not available or, if they were, they were too obviously tied to a particular interest to be convincing. In this situation, framers of the Namibian constitution had no other alternatives than to change the original proposal for another that took into account the views and interests of others. Such a use of impartial argumentation yielded more equitable outcomes than pure bargaining and increased the overall legitimacy of the process among political actors.

The study shows that the no-voting rule enhanced the bargaining power of each party. This feature explained why the costs of reaching agreement under no-vote rule can be extremely high. This finding illustrates that there are some ways in which the unanimity or joint-decision trap can be overcome, although unanimity requirements in multiparty negotiating situations do present many obvious difficulties. While there were tendencies at the Windhoek Constituent Assembly to focus on parties' preferences, this study showed that rhetoric in bargaining situations was very critical. Consequently, the impact the type of bargaining situation has on outcomes should not be underestimated.

This study also showed that the concept of compromise was the basis by which political disputes were settled. Delegates believed that given sufficient discussion, free from partisanship, the right solution to a dispute could be discovered. From the point of view of a party to the dispute, compromise involved compromising one's principles or beliefs without being convinced of their erroneousness. First, the integrative bargaining situation showed that when the preferences of delegates are strongly polarised and two or more constitutional proposals are negotiated, issue linkages are the negotiating tools used to reach an agreement. Second, the distributive bargaining situation demonstrated that when only one constitutional proposal is bargained, deadlocks can only be broken if the reluctant political party or parties obtain side deals that buy their consent. In spite of these constraints, delegates often adopted a deliberative approach. The social norm of impartiality, combined with a sincere willingness of many members to reach an integrative agreement, led them to resort, in many instances, to a practical style of problem solving. Delegates often tried to reduce dissonance by mutual explanation. They also proposed *ad hoc* solutions to many issues and based their arguments on pragmatic or empiricist grounds that could be understood by the other delegates. Several important questions raised by the delegates could be solved, in large part, by such an approach.

The study also reveals that the constitutional ethos forged by the majority of members of the committee favoured discussions moulded in legal terms. The legal background of some members and their inclination to reason in formal terms on constitutional issues strengthened this trend. This type of argument had the advantage to be based on common ground and to favour analogies with national constitutional devices, with which the members were familiar. This kind of argument

proved strong enough to force parties to make important concessions. In many instances, however, these two rational styles of arguing did not prove strong enough to help the parties overcome their divisions. On some major issues, the difference of visions between parties remained so strong that other modes of agreement-building were needed. In some cases, political parties resorted to the classic avenue of 'diplomatic' agreements: they excluded controversial subjects or forged compromise that remained vague or unpredictable, so that each party could give its own interpretation of the outcome. In these cases, the agreement remained an overlapping consensus: the parties agreed on the norm, but not on its motivation. In other cases, classic bargains re-emerged. Where some delegates believed that their vital interests were at stake, they used threats to preserve the *status quo* or to impose their view.

Evolution set the template for our emotional lives and for our approach to negotiation. Our emotional framework is a starting point, not an end. Depending on how emotions are approached in negotiation, we may be either slaves or masters to them - with varying consequences. This study revealed that negotiators can improve their self-awareness of emotions and that emotions can be controlled to one's advantage when bargaining. The outcome of constitution-making in Namibia was also influenced by the exchange of arguments and counter-arguments among the framers. The participants of the Windhoek Assembly engaged in this process were motivated by moral reasons rather than by strategic purposes. On the one hand, depending on the intensity of the conflicts at stake, political deliberation actually sharpened rather than resolved existing disagreement among the participants. On the other hand, political deliberation was often affected by strategic purposes as when political actors argued from principle to legitimate a partisan position. The study revealed that the framers of the Namibian constitution used political deliberation to resolve their disagreements.

The study further established that for constitutionalism to be legitimate, it must have the support of the people. Without this legitimacy, there is less assurance that either the constitution or rule of law generally, will be willingly accepted and internalised. In order to achieve such legitimacy, new constitutionalism borrows from the ideas of democracy to ensure that the populace is involved with the process of drafting the constitution. The promise of new constitutionalism can be clearly seen in post-conflict situations. By allowing opposing sides to come together and work

together in creating their shared new constitution, and by assuring that all sides have ownership in the process, it enhances the new constitution's legitimacy – as the Windhoek Assembly teaches us.

The study further established that in order to achieve collaborative solutions, participants must first understand that collaboration is voluntary. There should be no coercion used when establishing a problem-solving team. Further to that point, collaboration requires parity between participants. Every individual should have equal opportunities during interactions and participants must recognise that collaboration is based on mutual goals. This recognition allows negotiators to focus on agreement rather than differences.

The study also revealed that members of the Standing Committee sometimes resorted to a diplomatic approach. This has been a constant attitude among participants since the very beginning of assembly. Sometimes, the framers of the constitution even agreed to leave controversial issues out of their agreement, so as to avoid incompatibilities. Similarly, negotiators tended to compromise not because splitting the difference is the best option, but because they have learned that such social heuristics get them through life with less hassle. Social heuristic should be understood through its relation to hermeneutics. Hermeneutics has as its principal task the formulation of a set of elementary or general principles for interpretation and construction. Conceived at a high level of abstraction, these principles function as regulative maxims. Along Kantian-transcendental lines, they regulate the understanding and so make interpretation and construction possible. Weaker or stronger compromises sometimes crept in as a result of the time pressure felt by the delegates. In other words, time factor forced members of the drafting committee to compromise.

Emotions play an important role in bargaining. These emotions serve to integrate or segregate distinct individuals into a deliberative or judging body. While there were times when individual delegates seemed to deserve angry rhetoric, it may not be justified from a broader moral perspective, especially when the goal is the good of the state or the community. As the Windhoek Assembly drew on shared norms to justify their positions in an arguing process, arguing was more common as well as more successful because the dissolution of a democratic order was not desirable because angry rhetoric hinders or assists individuals working and deliberating together.

The study shows that in actual situations, where the burden of history and diverse backgrounds exert significant pressure on participants, political deliberation is a vexed and complex, unpredictable process, through which participants come to a changed understanding of the process itself as well as of their own positions and goals. The study reveals that “democratic deliberation” cannot be identified unilaterally with either rational argumentation or compromise and consensus. Compromise is one of the means of conflict resolution, not an end in itself. Participants sit down together not in order to compromise but in order to achieve a shared outcome.

The study further concludes that political deliberation involves some form of public reasoning and communication. In the course of deliberation, conflicts necessarily arise and how these conflicts are dealt with is an essential part of the process. The thesis examined the many instances and sources of conflict within the Windhoek Assembly during the drafting of the Namibian Constitution, as well as the ways in which participants dealt with conflict. Thus, for instance, compromise is good if it resolves conflict, but it may not be good if it leads to some participants feeling that they gave up too much and compromised their interests. While democratic theory often emphasizes consensus-building in the context of deliberation, the study finds that the common ground on which participants can base their consensus-building is not fixed, but is, rather, an element in the heuristic process of discovery that deliberation represents.

Recommendations for future study

The study of rhetoric of negotiations at the Windhoek Assembly unearthed interesting material on legislative rhetoric. The study established not only that such rhetoric is consequential, but that there is a need for other scholars to begin to view

legislative rhetoric as important. Rhetoric is a potent tool, all the more so when employed in the public legislative chamber. Thus, legislatures and individual legislators must take responsibility for using this rhetoric in positive ways.

Further, a comparative study of the rhetoric of constitutional discourse between Namibia and South Africa should be conducted by other scholars. It suffices to mention that both countries first adopted constitutional principles and then held constitutional assemblies to draft their respective constitutions. The similarities are striking: both countries were breaking from apartheid; both were led by liberation movements – namely, SWAPO in Namibia, and the African National Congress in South Africa; local people were the architect of their own constitutions; and two of the three legal advisors at the Windhoek Assembly – namely, Arthur Chaskalson and Marinus Wiechers, later advised the South African constitutional talks.

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University of Cape Town

APPENDIX A

PRINCIPLES CONCERNING THE CONSTITUENT ASSEMBLY AND THE CONSTITUTION FOR AN INDEPENDENT NAMIBIA

A. Constituent Assembly

1. In accordance with the United Nations Security Council resolution 435(1978), elections will be held to select a Constituent Assembly which will adopt a Constitution for an independent Namibia. The Constitution will determine the organization and powers of all levels of government.

— Every adult Namibian will be eligible, without discrimination or fear of intimidation from any source, to vote, campaign and stand for election to the Constituent Assembly.

— Voting will be by secret ballot, with provisions made for those who cannot read or write.

— The date for the beginning of the electoral campaign, the date of elections, the electoral system, the preparation of voter rolls and other aspects of electoral procedure will be promptly decided upon so as to give all political parties and interested persons, without regard to their political views, a full and fair opportunity to organize and participate in the electoral process.

— Full freedom of speech, assembly, movement and press shall be guaranteed.

— The electoral system will seek to ensure fair representation in the Constituent Assembly to different political parties which gain substantial support in the election.

2. The Constituent Assembly will formulate the Constitution for an Independent Namibia in accordance with the principles in Part B below and will adopt the Constitution as a whole by a two-thirds majority of its total membership.

B. Principles for a Constitution for an Independent Namibia

1. Namibia will be a unitary, sovereign, and democratic state.

2. The Constitution will be the supreme law of the State. It may be amended only by a designated process involving the legislature and/or votes cast in a popular referendum.

3. The Constitution will determine the organization and powers of all levels of government. It will provide for a system of governance with three branches; an elected

executive branch which will be responsible to the legislative branch; a legislative branch to be elected by universal and equal suffrage which will be responsible for the passage of all laws; and an independent judicial branch which will be responsible for the interpretation of the Constitution and for ensuring its supremacy and the authority of the law. The executive and legislative branches will be constituted by periodic and genuine elections which will be held by secret vote.

4. The electoral system will be consistent with the principles in A.1 above.

5. there will be a declaration of fundamental rights, which will include the rights to life, personal liberty and freedom of movement; to freedom of conscience; to freedom of expression, including freedom of speech and a free press; to freedom of assembly and association, including political parties and trade unions; to due process and equality before the law; to protection from arbitrary deprivation of private property or deprivation of private property without just compensation; and to freedom from racial, ethnic, religious or sexual discrimination. The declaration of rights will be consistent with the provisions of the Universal Declaration of Human Rights. Aggrieved individuals will be entitled to have the courts adjudicate and enforce these rights.

6. It will be forbidden to create criminal offences with retrospective effect or to provide for increased penalties with retrospective effect.

7. Provisions will be made for the balanced structure of the public service, the police service and defence services and for equal access by all to recruitment of these services. The fair administration of personnel policy in relation to these services will be assured by appropriate independent bodies.

8. Provisions will be made for the establishment of elected council for local and/or regional administration.

APPENDIX B

LIST OF THE NAMES OF MEMBERS OF THE STANDING COMMITTEE ON STANDING RULES AND ORDERS AND INTERNAL ARRANGEMENTS

SWAPO

Mr. Hage Geingob (Chairman)
Dr. Ernst Tjiriange
Mr. Hartmut Ruppel
Mr. Hidipo Hamutenya
Mr. Theo Ben Gurirab
Mrs. Pendukeni Ithana
Dr. Nickey Iyambo
Dr. Mose Tjitendero
Mr. Nahas Angula
Dr. Peter Katjivivi
Mr. Nico Bessinger
Mr. Ben Amathila

DTA

Mr. Dirk Mudge
Mr. Piet Junius later replaced by Mr. Barney Barnes
Mr. Hans Staby
Mr. Andrew Matjila

NNF

Mr. Vekuii Rukoro

FCN

Mr. Hans (J.G.A) Diergaardt later replaced by Prof. Mburumba Kerina

NPF

Mr. Moses Katjuongua

ACN

Mr. Kosie (J.W.F) Pretorius

UDF

Mr. Reggie Diergaardt later replaced by Mr. Eric Biwa

APPENDIX C

THE CONSTITUTION OF THE REPUBLIC OF NAMIBIA

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AMENDMENTS TO THE CONSTITUTION

Namibian Constitution First Amendment Act, 199868

PREAMBLE

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace;

Whereas the said rights include the right of the individual to life, liberty and the pursuit of happiness, regardless of race, colour, ethnic origin, sex, religion, creed or social or economic status;

Whereas the said rights are most effectively maintained and protected in a democratic society, where the government is responsible to freely elected representatives of the people, operating under a sovereign constitution and a free and independent judiciary;

Whereas these rights have for so long been denied to the people of Namibia by colonialism racism and apartheid;

Whereas we the people of Namibia -
have finally emerged victorious in our struggle against colonialism, racism and apartheid;

are determined to adopt a Constitution which expresses for ourselves and our children our resolve to cherish and to protect the gains of our long struggle;

desire to promote amongst all of us the dignity of the individual and the unity and integrity of the Namibian nation among and in association with the nations of the world;

will strive to achieve national reconciliation and to foster peace, unity and a common loyalty to a single state;

committed to these principles, have resolved to constitute the Republic of Namibia as a sovereign, secular, democratic and unitary State securing to all our citizens justice, liberty, equality and fraternity,

Now therefore, we the people of Namibia accept and adopt this Constitution as the fundamental law of our Sovereign and Independent Republic.

CHAPTER 1

The Republic

Article 1 Establishment of the Republic of Namibia and Identification of its Territory

- (1) The Republic of Namibia is hereby established as a sovereign, secular, democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all.
- (2) All power shall vest in the people of Namibia who shall exercise their sovereignty through the democratic institutions of the State.
- (3) The main organs of the State shall be the Executive, the Legislature and the Judiciary.
- (4) The national territory of Namibia shall consist of the whole of the territory recognised by the international community through the organs of the United Nations as Namibia, including the enclave, harbour and port of Walvis Bay, as well as the off-shore islands of Namibia, and its southern boundary shall extend to the middle of the Orange River.
- (5) Windhoek shall be the seat of central Government.
- (6) This Constitution shall be the Supreme Law of Namibia.

Article 2 National Symbols

- (1) Namibia shall have a National Flag, the description of which is set out in Schedule 6 hereof.
- (2) Namibia shall have a National Coat of Arms, a National Anthem and a National Seal to be determined by Act of Parliament, which shall require a two-thirds majority of all the members of the National Assembly for adoption and amendment.
- (3) (a) The National Seal of the Republic of Namibia shall show the Coat of Arms circumscribed with the word "NAMIBIA" and the motto of the country, which shall be determined by Act of Parliament as aforesaid.
(b) The National Seal shall be in the custody of the President or such person whom the President may designate for such purpose and shall be used on such official documents as the President may determine.

Article 3 Language

- (1) The official language of Namibia shall be English.
- (2) Nothing contained in this Constitution shall prohibit the use of any other language as a medium of instruction in private schools or in schools financed or subsidized by the State, subject to compliance with such requirements as may be imposed by law, to ensure proficiency in the official language, or for pedagogic reasons.

- (3) Nothing contained in Sub-Article (1) hereof shall preclude legislation by Parliament which permits the use of a language other than English for legislative, administrative and judicial purposes in regions or areas where such other language or languages are spoken by a substantial component of the population.

CHAPTER 2

Citizenship

Article 4 Acquisition and Loss of Citizenship

- (1) The following persons shall be citizens of Namibia by birth:
- (a) those born in Namibia before the date of Independence whose fathers or mothers would have been Namibian citizens at the time of the birth of such persons, if this Constitution had been in force at that time; and
 - (b) those born in Namibia before the date of Independence, who are not Namibian citizens under Sub-Article (a) hereof, and whose fathers or mothers were ordinarily resident in Namibia at the time of the birth of such persons: provided that their fathers or mothers were not then persons:
 - (aa) who were enjoying diplomatic immunity in Namibia under any law relating to diplomatic privileges; or
 - (bb) who were career representatives of another country; or
 - (cc) who were members of any police, military or security unit seconded for service within Namibia by the Government of another country: provided further that this Sub-Article shall not apply to persons claiming citizenship of Namibia by birth if such persons were ordinarily resident in Namibia at the date of Independence and had been so resident for a continuous period of not less than five (5) years prior to such date, or if the fathers or mothers of such persons claiming citizenship were ordinarily resident in Namibia at the date of the birth of such persons and had been so resident for a continuous period of not less than five (5) years prior to such date;
 - (c) those born in Namibia after the date of Independence whose fathers or mothers are Namibian citizens at the time of the birth of such persons;
 - (d) those born in Namibia after the date of Independence who do not qualify for citizenship under Sub-Article (c) hereof, and whose fathers or mothers are ordinarily resident in Namibia at the time of the birth of such persons: provided that their fathers or mothers are not then persons:
 - (aa) enjoying diplomatic immunity in Namibia under any law relating to diplomatic privileges; or
 - (bb) Who are career representatives of another country; or
 - (cc) who are members of any police, military or security unit seconded for

service within Namibia by the Government of another country; or
(dd) who are illegal immigrants: provided further that Sub-Articles (aa), (bb), (cc) and (dd) hereof will not apply to children who would otherwise be stateless.

- (2) The following persons shall be citizens of Namibia by descent:
(a) those who are not Namibian citizens under Sub-Article (1) hereof and whose fathers or mothers at the time of the birth of such persons are citizens of Namibia or whose fathers or mothers would have qualified for Namibian citizenship by birth under Sub-Article (1) hereof, if this Constitution had been in force at that time; and
(b) who comply with such requirements as to registration of citizenship as may be required by Act of Parliament: provided that nothing in this Constitution shall preclude Parliament from enacting legislation which requires the birth of such persons born after the date of Independence to be registered within a specific time either in Namibia or at an embassy, consulate or office of a trade representative of the Government of Namibia.
- (3) The following persons shall be citizens of Namibia by marriage:
(a) those who are not Namibian citizens under Sub-Article (1) or (2) hereof and who:
(aa) in good faith marry a Namibian citizen or, prior to the coming into force of this Constitution, in good faith married a person who would have qualified for Namibian citizenship if this Constitution had been in force; and
(bb) subsequent to such marriage have ordinarily resided in Namibia as the spouse of such person for a period of not less than two (2) years; and
(cc) apply to become citizens of Namibia;
(b) for the purposes of this Sub-Article (and without derogating from any effect that it may have for any other purposes) a marriage by customary law shall be deemed to be a marriage: provided that nothing in this Constitution shall preclude Parliament from enacting legislation which defines the requirements which need to be satisfied for a marriage by customary law to be recognised as such for the purposes of this Sub-Article.
- (4) Citizenship by registration may be claimed by persons who are not Namibian citizens under Sub-Articles (1), (2) or (3) hereof and who were ordinarily resident in Namibia at the date of Independence, and had been so resident for a continuous period of not less than five (5) years prior to such date: provided that application for Namibian citizenship under this Sub-Article is made within a period of twelve (12) months from the date of Independence, and prior to making such application, such persons renounce the citizenship of any other country of which they are citizens.
- (5) Citizenship by naturalisation may be applied for by persons who are not Namibian citizens under Sub-Articles(1), (2), (3) or (4) hereof and who:

- (a) are ordinarily resident in Namibia at the time when the application for naturalisation is made; and
 - (b) have been so resident in Namibia for a continuous period of not less than five (5) years (whether before or after the date of Independence); and
 - (c) satisfy any other criteria pertaining to health, morality, security or legality of residence as may be prescribed by law.
- (6) Nothing contained herein shall preclude Parliament from authorizing by law the conferment of Namibian citizenship upon any fit and proper person by virtue of any special skill or experience or commitment to or services rendered to the Namibian nation either before or at any time after the date of Independence.
- (7) Namibian citizenship shall be lost by persons who renounce their Namibian citizenship by voluntarily signing a formal declaration to that effect.
- (8) Nothing in this Constitution shall preclude Parliament from enacting legislation providing for the loss of Namibian citizenship by persons who, after the date of Independence:
- (a) have acquired the citizenship of any other country by any voluntary act; or
 - (b) have served or volunteered to serve in the armed or security forces of any other country without the written permission of the Namibian Government; or
 - (c) have taken up permanent residence in any other country and have absented themselves thereafter from Namibia for a period in excess of two (2) years without the written permission of the Namibian Government: provided that no person who is a citizen of Namibia by birth or descent may be deprived of Namibian citizenship by such legislation.
- (9) Parliament shall be entitled to make further laws not inconsistent with this Constitution regulating the acquisition or loss of Namibian citizenship.

CHAPTER 3

Fundamental Human Rights and Freedoms

Article 5 Protection of Fundamental Rights and Freedoms

The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.

Article 6 Protection of Life

The right to life shall be respected and protected. No law may prescribe death as a competent

sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia.

Article 7 Protection of Liberty

No persons shall be deprived of personal liberty except according to procedures established by law.

Article 8 Respect for Human Dignity

- (1) The dignity of all persons shall be inviolable.
- (2) (a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.
(b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

Article 9 Slavery and Forced Labour

- (1) No persons shall be held in slavery or servitude.
- (2) No persons shall be required to perform forced labour.
- (3) For the purposes of this Article, the expression "forced labour" shall not include:
 - (a) any labour required in consequence of a sentence or order of a Court;
 - (b) any labour required of persons while lawfully detained which, though not required in consequence of a sentence or order of a Court, is reasonably necessary in the interests of hygiene;
 - (c) any labour required of members of the defence force, the police force and the prison service in pursuance of their duties as such or, in the case of persons who have conscientious objections to serving as members of the defence force, any labour which they are required by law to perform in place of such service;
 - (d) any labour required during any period of public emergency or in the event of any other emergency or calamity which threatens the life and well-being of the community, to the extent that requiring such labour is reasonably justifiable in the circumstances of any situation arising or existing during that period or as a result of that other emergency or calamity, for the purpose of dealing with that situation;
 - (e) any labour reasonably required as part of reasonable and normal communal or other civic obligations.

Article 10 Equality and Freedom from Discrimination

- (1) All persons shall be equal before the law.

- (2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

Article 11 Arrest and Detention

- (1) No persons shall be subject to arbitrary arrest or detention.
- (2) No persons who are arrested shall be detained in custody without being informed promptly in a language they understand of the grounds for such arrest.
- (3) All persons who are arrested and detained in custody shall be brought before the nearest Magistrate or other judicial officer within a period of forty-eight (48) hours of their arrest or, if this is not reasonably possible, as soon as possible thereafter, and no such persons shall be detained in custody beyond such period without the authority of a Magistrate or other judicial officer.
- (4) Nothing contained in Sub-Article (3) hereof shall apply to illegal immigrants held in custody under any law dealing with illegal immigration: provided that such persons shall not be deported from Namibia unless deportation is authorised by a Tribunal empowered by law to give such authority.
- (5) No persons who have been arrested and held in custody as illegal immigrants shall be denied the right to consult confidentially legal practitioners of their choice, and there shall be no interference with this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security or for public safety.

Article 12 Fair Trial

- (1) (a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.
- (b) A trial referred to in Sub-Article (a) hereof shall take place within a reasonable time, failing which the accused shall be released.
- (c) Judgments in criminal cases shall be given in public, except where the interests of juvenile persons or morals otherwise require.
- (d) All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them.
- (e) All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice.
- (f) No persons shall be compelled to give testimony against themselves or

their spouses, who shall include partners in a marriage by customary law, and no Court shall admit in evidence against such persons testimony which has been obtained from such persons in violation of Article 8(2)(b) hereof.

- (2) No persons shall be liable to be tried, convicted or punished again for any criminal offence for which they have already been convicted or acquitted according to law: provided that nothing in this Sub-Article shall be construed as changing the provisions of the common law defences of "previous acquittal" and "previous conviction".
- (3) No persons shall be tried or convicted for any criminal offence or on account of any act or omission which did not constitute a criminal offence at the time when it was committed, nor shall a penalty be imposed exceeding that which was applicable at the time when the offence was committed.

Article 13 Privacy

- (1) No persons shall be subject to interference with the privacy of their homes, correspondence or communications save as in accordance with law and as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others.
- (2) Searches of the person or the homes of individuals shall only be justified:
 - (a) where these are authorised by a competent judicial officer;
 - (b) in cases where delay in obtaining such judicial authority carries with it the danger of prejudicing the objects of the search or the public interest, and such procedures as are prescribed by Act of Parliament to preclude abuse are properly satisfied.

Article 14 Family

- (1) Men and women of full age, without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status shall have the right to marry and to found a family. They shall be entitled to equal rights as to marriage, during marriage and at its dissolution.
- (2) Marriage shall be entered into only with the free and full consent of the intending spouses.
- (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 15 Children's Rights

- (1) Children shall have the right from birth to a name, the right to acquire a nationality and, subject to legislation enacted in the best interests of children, as far as possible the right to know and be cared for by their parents.

- (2) Children are entitled to be protected from economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education, or to be harmful to their health or physical, mental, spiritual, moral or social development. For the purposes of this Sub Article children shall be persons under the age of sixteen (16) years.
- (3) No children under the age of fourteen (14) years shall be employed to work in any factory or mine, save under conditions and circumstances regulated by Act of Parliament. Nothing in this Sub-Article shall be construed as derogating in any way from Sub-Article (2) hereof.
- (4) Any arrangement or scheme employed on any farm or other undertaking, the object or effect of which is to compel the minor children of an employee to work for or in the interest of the employer of such employee, shall for the purposes of Article 9 hereof be deemed to constitute an arrangement or scheme to compel the performance of forced labour.
- (5) No law authorising preventive detention shall permit children under the age of sixteen (16) years to be detained.

Article 16 Property

- (1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.
- (2) The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament.

Article 17 Political Activity

- (1) All citizens shall have the right to participate in peaceful political activity intended to influence the composition and policies of the Government. All citizens shall have the right to form and join political parties and; subject to such qualifications prescribed by law as are necessary in a democratic society to participate in the conduct of public affairs, whether directly or through freely chosen representatives.
- (2) Every citizen who has reached the age of eighteen (18) years shall have the right to vote and who has reached the age of twenty-one (21) years to be elected to public office, unless otherwise provided herein.
- (3) The rights guaranteed by Sub-Article (2) hereof may only be abrogated, suspended or be impinged upon by Parliament in respect of specified categories of persons on such grounds of infirmity or on such grounds of public interest or morality as are necessary in a democratic society.

Article 18 Administrative Justice

Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.

Article 19 Culture

Every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest.

Article 20 Education

- (1) All persons shall have the right to education.
- (2) Primary education shall be compulsory and the State shall provide reasonable facilities to render effective this right for every resident within Namibia, by establishing and maintaining State schools at which primary education will be provided free of charge.
- (3) Children shall not be allowed to leave school until they have completed their primary education or have attained the age of sixteen (16) years, whichever is the sooner, save in so far as this may be authorised by Act of Parliament on grounds of health or other considerations pertaining to the public interest.
- (4) All persons shall have the right, at their own expense, to establish and to maintain private schools, or colleges or other institutions of tertiary education: provided that:
 - (a) such schools, colleges or institutions of tertiary education are registered with a Government department in accordance with any law authorising and regulating such registration;
 - (b) the standards maintained by such schools, colleges or institutions of tertiary education are not inferior to the standards maintained in comparable schools, colleges or institutions of tertiary education funded by the State;
 - (c) no restrictions of whatever nature are imposed with respect to the admission of pupils based on race, colour or creed;
 - (d) no restrictions of whatever nature are imposed with respect to the recruitment of staff based on race or colour.

Article 21 Fundamental Freedoms

- (1) All persons shall have the right to:

- (a) freedom of speech and expression, which shall include freedom of the press and other media;
 - (b) freedom of thought, conscience and belief, which shall include academic freedom in institutions of higher learning;
 - (c) freedom to practise any religion and to manifest such practice;
 - (d) assemble peaceably and without arms;
 - (e) freedom of association, which shall include freedom to form and join associations or unions, including trade unions and political parties;
 - (f) withhold their labour without being exposed to criminal penalties;
 - (g) move freely throughout Namibia;
 - (h) reside and settle in any part of Namibia;
 - (i) leave and return to Namibia;
 - (j) practise any profession, or carry on any occupation, trade or business.
- (2) The fundamental freedoms referred to in Sub-Article (1) hereof shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

Article 22 Limitation upon Fundamental Rights and Freedoms

Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorised, any law providing for such limitation shall:

- (a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;
- (b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest.

Article 23 Apartheid and Affirmative Action

- (1) The practice of racial discrimination and the practice and ideology of apartheid from which the majority of the people of Namibia have suffered for so long shall be prohibited and by Act of Parliament such practices, and the propagation of such practices, may be rendered criminally punishable by the ordinary Courts by means of such punishment as Parliament deems necessary for the purposes of expressing the revulsion of the Namibian people at such practices.

- (2) Nothing contained in Article 10 hereof shall prevent Parliament from Enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of past discriminatory laws or practices, or for achieving a balanced structuring of the public service, the police force, the defence force, and the prison service.
- (3) In the enactment of legislation and the application of any policies and practices contemplated by Sub-Article (2) hereof, it shall be permissible to have regard to the fact that women in Namibia have traditionally suffered special discrimination and that they need to be encouraged and enabled to play a full, equal and effective role in the political, social, economic and cultural life of the nation.

Article 24 Derogation

- (1) Nothing contained in or done under the authority of Article 26 hereof shall be held to be inconsistent with or in contravention of this Constitution to the extent that it authorises the taking of measures during any period when Namibia is in a state of national defence or any period when a declaration of emergency under this Constitution is in force.
- (2) Where any persons are detained by virtue of such authorisation as is referred to in Sub-Article (1) hereof, the following provisions shall apply:
 - (a) they shall, as soon as reasonably practicable and in any case not more than five (5) days after the commencement of their detention, be furnished with a statement in writing in a language that they understand specifying in detail the grounds upon which they are detained and, at their request, this statement shall be read to them;
 - (b) not more than fourteen (14) days after the commencement of their detention, a notification shall be published in the Gazette stating that they have been detained and giving particulars of the provision of law under which their detention is authorised;
 - (c) not more than one (1) month after the commencement of their detention and thereafter during their detention at intervals of not more than three (3) months, their cases shall be reviewed by the Advisory Board referred to in Article 26 (5)(c) hereof, which shall order their release from detention if it is satisfied that it is not reasonably necessary for the purposes of the emergency to continue the detention of such persons;
 - (d) they shall be afforded such opportunity for the making of representations as may be desirable or expedient in the circumstances, having regard to the public interest and the interests of the detained persons.
- (3) Nothing contained in this Article shall permit a derogation from or suspension of the fundamental rights or freedoms referred to in Articles 5, 6, 8, 9, 10, 12, 14, 15, 18, 19 and 21(1)(a), (b), (c) and (e) hereof, or the denial of access by any persons to legal practitioners or a Court of law.

Article 25 Enforcement of Fundamental Rights and Freedoms

- (1) Save in so far as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid: provided that:

 - (a) a competent Court, instead of declaring such law or action to be invalid, shall have the power and the discretion in an appropriate case to allow Parliament, any subordinate legislative authority, or the Executive and the agencies of Government, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it. In such event and until such correction, or until the expiry of the time limit set by the Court, whichever be the shorter, such impugned law or action shall be deemed to be valid;
 - (b) any law which was in force immediately before the date of Independence shall remain in force until amended, repealed or declared unconstitutional. If a competent Court is of the opinion that such law is unconstitutional, it may either set aside the law, or allow Parliament to correct any defect in such law, in which event the provisions of Sub Article (a) hereof shall apply.
 - (2) Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.
 - (3) Subject to the provisions of this Constitution, the Court referred to in Sub Article (2) hereof shall have the power to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms conferred on them under the provisions of this Constitution, should the Court come to the conclusion that such rights or freedoms have been unlawfully denied or violated, or that grounds exist for the protection of such rights or freedoms by interdict.
 - (4) The power of the Court shall include the power to award monetary compensation in respect of any damage suffered by the aggrieved persons in consequence of such unlawful denial or violation of their fundamental rights and freedoms, where it considers such an award to be appropriate in the circumstances of particular cases.
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CHAPTER 4

Public Emergency, State of National Defence and Martial Law

Article 26 State of Emergency, State of National Defence and Martial Law

- (1) At a time of national disaster or during a state of national defence or public emergency threatening the life of the nation or the constitutional order, the President may by Proclamation in the Gazette declare that a state of emergency exists in Namibia or any part thereof.
- (2) A declaration under Sub-Article (1) hereof, if not sooner revoked, shall cease to have effect:
 - (a) in the case of a declaration made when the National Assembly is sitting or has been summoned to meet, at the expiration of a period of seven (7) days after publication of the declaration; or
 - (b) in any other case, at the expiration of a period of thirty (30) days after publication of the declaration; unless before the expiration of that period, it is approved by a resolution passed by the National Assembly by a two-thirds majority of all its members.
- (3) Subject to the provisions of Sub-Article (4) hereof, a declaration approved by a resolution of the National Assembly under Sub-Article (2) hereof shall continue to be in force until the expiration of a period of six (6) months after being so approved or until such earlier date as may be specified in the resolution: provided that the National Assembly may, by resolution by a two-thirds majority of all its members, extend its approval of the declaration for periods of not more than six (6) months at a time.
- (4) The National Assembly may by resolution at any time revoke a declaration approved by it in terms of this Article.
- (5)
 - (a) During a state of emergency in terms of this Article or when a state of national defence prevails, the President shall have the power by Proclamation to make such regulations as in his or her opinion are necessary for the protection of national security, public safety and the maintenance of law and order.
 - (b) The powers of the President to make such regulations shall include the power to suspend the operation of any rule of the common law or statute or any fundamental right or freedom protected by this Constitution, for such period and subject to such conditions as are reasonably justifiable for the purpose of dealing with the situation which has given rise to the emergency: provided that nothing in this Sub-Article shall enable the President to act contrary to the provisions of Article 24 hereof.
 - (c) Where any regulation made under Sub-Article (b) hereof provides for detention without trial, provision shall also be made for an Advisory Board, to be appointed by the President on the recommendation of the Judicial Service Commission, and consisting of no more than five (5) persons, of whom no fewer than three (3) persons shall be Judges of the Supreme

- Court or the High Court or qualified to be such. The Advisory Board shall perform the function set out in Article 24 (2)(c) hereof.
- (6) Any regulations made by the President pursuant to the provisions of Sub Article (5) hereof shall cease to have legal force if they have not been approved by a resolution of the National Assembly within fourteen (14) days from the date when the National Assembly first sits in session after the date of the commencement of any such regulations.
- (7) The President shall have the power to proclaim or terminate martial law. Martial law may be proclaimed only when a state of national defence involving another country exists or when civil war prevails in Namibia: provided that any proclamation of martial law shall cease to be valid if it is not approved within a reasonable time by a resolution passed by a two-thirds majority of all the members of the National Assembly.

CHAPTER 5

The President

Article 27 Head of State and Government

- (1) The President shall be the Head of State and of the Government and the Commander-in-Chief of the Defence Force.
- (2) The executive power of the Republic of Namibia shall vest in the President and the Cabinet.
- (3) Except as may be otherwise provided in this Constitution or by law, the President shall in the exercise of his or her functions be obliged to act in consultation with the Cabinet.

Article 28 Election

- (1) The President shall be elected in accordance with the provisions of this Constitution and subject thereto.
- (2) Election of the President shall be:
- (a) by direct, universal and equal suffrage; and
 - (b) conducted in accordance with principles and procedures to be determined by Act of Parliament: provided that no person shall be elected as President unless he or she has received more than fifty (50) per cent of the votes cast and the necessary number of ballots shall be conducted until such result is reached.
- (3) Every citizen of Namibia by birth or descent, over the age of thirty-five (35) years, and who is eligible to be elected to office as a member of the National Assembly

- shall be eligible for election as President.
- (4) The procedures to be followed for the nomination of candidates for election as President, and for all matters necessary and incidental to ensure the free, fair and effective election of a President, shall be determined by Act of Parliament: provided that any registered political party shall be entitled to nominate a candidate, and any person supported by a minimum number of registered voters to be determined by Act of Parliament shall also be entitled to be nominated as a candidate.

Article 29 Term of Office

- (1) (a) The President's term of office shall be five (5) years unless he or she dies or resigns before the expiry of the said term or is removed from office.
(b) In the event of the dissolution of the National Assembly in the circumstances provided for under Article 57(1) hereof, the President's term of office shall also expire.
- (2) A President shall be removed from office if a two-thirds majority of all the members of the National Assembly, confirmed by a two-thirds majority of all the members of the National Council, adopts a resolution impeaching the President on the ground that he or she has been guilty of a violation of the Constitution or guilty of a serious violation of the laws of the land or otherwise guilty of such gross misconduct or ineptitude as to render him or her unfit to hold with dignity and honour the office of President.
- (3) A person shall hold office as President for not more than two terms.
- (4) If a President dies, resigns or is removed from office in terms of this Constitution, the vacant office of President shall be filled for the unexpired period thereof as follows:
(a) if the vacancy occurs not more than one (1) year before the date on which Presidential elections are required to be held, the vacancy shall be filled in accordance with the provisions of Article 34 hereof;
(b) if the vacancy occurs more than one (1) year before the date on which Presidential elections are required to be held, an election for the President shall be held in accordance with the provisions of Article 28 hereof within a period of ninety (90) days from the date on which the vacancy occurred, and pending such election the vacant office shall be filled in accordance with the provisions of Article 34 hereof.
- (5) If the President dissolves the National Assembly under Articles 32(3)(a) and 57(1) hereof, a new election for President shall be held in accordance with the provisions of Article 28 hereof within ninety (90) days, and pending such election the President shall remain in office, and the provisions of Article 58 hereof shall be applicable.
- (6) If a person becomes President under Sub-Article (4) hereof, the period of time during which he or she holds office consequent upon such election or succession shall not be regarded as a term for the purposes of Sub-Article (3) hereof.

Article 30 Oath or Affirmation

Before formally assuming office, a President-elect shall make the following oath or affirmation which shall be administered by the Chief Justice or a Judge designated by the Chief Justice for this purpose:

"I, do hereby swear/solemnly affirm, That I will strive to the best of my ability to uphold, protect and defend as the Supreme Law the Constitution of the Republic of Namibia, and faithfully to obey, execute and administer the laws of the Republic of Namibia; That I will protect the independence, sovereignty, territorial integrity and the material and spiritual resources of the Republic of Namibia; and That I will endeavour to the best of my ability to ensure justice for all the inhabitants of the Republic of Namibia. (in the case of an oath)

So help me God."

Article 31 Immunity from Civil and Criminal Proceedings

- (1) No person holding the office of President or performing the functions of President may be sued in any civil proceedings save where such proceedings concern an act done in his or her official capacity as President.
- (2) No person holding the office of President shall be charged with any criminal offence or be amenable to the criminal jurisdiction of any Court in respect of any act allegedly performed, or any omission to perform any act, during his or her tenure of office as President.
- (3) After a President has vacated that office:
 - (a) no Court may entertain any action against him or her in any civil proceedings in respect of any act done in his or her official capacity as President;
 - (b) a civil or criminal Court shall only have jurisdiction to entertain proceedings against him or her, in respect of acts of commission or omission alleged to have been perpetrated in his or her personal capacity whilst holding office as President, if Parliament by resolution has removed the President on the grounds specified in this Constitution and if a resolution is adopted by Parliament resolving that any such proceedings are justified in the public interest notwithstanding any damage such proceedings might cause to the dignity of the office of President.

Article 32 Functions, Powers and Duties

- (1) As the Head of State, the President shall uphold, protect and defend the Constitution as the Supreme Law, and shall perform with dignity and leadership

all acts necessary, expedient, reasonable and incidental to the discharge of the executive functions of the Government, subject to the overriding terms of this Constitution and the laws of Namibia, which he or she is constitutionally obliged to protect, to administer and to execute.

(2) In accordance with the responsibility of the executive branch of Government to the legislative branch, the President and the Cabinet shall each year during the consideration of the official budget attend Parliament. During such session the President shall address Parliament on the state of the nation and on the future policies of the Government, shall report on the policies of the previous year and shall be available to respond to questions.

(3) Without derogating from the generality of the functions and powers contemplated by Sub-Article (1) hereof, the President shall preside over meetings of the Cabinet and shall have the power, subject to this Constitution to:

(a) dissolve the National Assembly by Proclamation in the circumstances provided for in Article 57(1) hereof;

(b) determine the times for the holding of special sessions of the National Assembly, and to prorogue such sessions;

(c) accredit, receive and recognise ambassadors, and to appoint ambassadors, plenipotentiaries, diplomatic representatives and other diplomatic officers, consuls and consular officers;

(d) pardon or reprieve offenders, either unconditionally or subject to such conditions as the President may deem fit;

(e) negotiate and sign international agreements, and to delegate such power;

(f) declare martial law or, if it is necessary for the defence of the nation, declare that a state of national defence exists: provided that this power shall be exercised subject to the terms of Article 26(7) hereof;

(g) establish and dissolve such Government departments and ministries as the President may at any time consider to be necessary or expedient for the good government of Namibia;

(h) confer such honours as the President considers appropriate on citizens, residents and friends of Namibia in consultation with interested and relevant persons and institutions;

(i) appoint the following persons:

(aa) the Prime Minister;

(bb) Ministers and Deputy-Ministers;

(cc) the Attorney-General;

(dd) the Director-General of Planning;

(ee) any other person or persons who are required by any other provision of this Constitution or any other law to be appointed by the President.

- (4) The President shall also have the power, subject to this Constitution, to appoint:
- (a) on the recommendation of the Judicial Service Commission:
 - (aa) the Chief Justice, the Judge-President of the High Court and other Judges of the Supreme Court and the High Court;
 - (bb) the Ombudsman;
 - (cc) the Prosecutor-General;
 - (b) on the recommendation of the Public Service Commission:
 - (aa) the Auditor-General;
 - (bb) the Governor and the Deputy-Governor of the Central Bank;
 - (c) on the recommendation of the Security Commission:
 - (aa) the Chief of the Defence Force;
 - (bb) the Inspector-General of Police;
 - (cc) the Commissioner of Prisons.
- (5) Subject to the provisions of this Constitution dealing with the signing of any laws passed by Parliament and the promulgation and publication of such laws in the Gazette, the President shall have the power to:
- (a) sign and promulgate any Proclamation which by law he or she is entitled to proclaim as President;
 - (b) initiate, in so far as he or she considers it necessary and expedient, laws for submission to and consideration by the National Assembly;
 - (c) appoint as members of the National Assembly but without any vote therein, not more than six (6) persons by virtue of their special expertise, status, skill or experience.
- (6) Subject to the provisions of this Constitution or any other law, any person appointed by the President pursuant to the powers vested in him or her by this Constitution or any other law may be removed by the President by the same process through which such person was appointed.
- (7) Subject to the provisions of this Constitution and of any other law of application in this matter, the President may, in consultation with the Cabinet and on the recommendation of the Public Service Commission:
- (a) constitute any office in the public service of Namibia not otherwise provided for by any other law;
 - (b) appoint any person to such office,
 - (c) determine the tenure of any person so appointed as well as the terms and conditions of his or her service.

- (8) All appointments made and actions taken under Sub-Articles (3), (4), (5), (6) and (7) hereof shall be announced by the President by Proclamation in the Gazette.
- (9) Subject to the provisions of this Constitution and save where this Constitution otherwise provides, any action taken by the President pursuant to any power vested in the President by the terms of this Article shall be capable of being reviewed, reversed or corrected on such terms as are deemed expedient and proper should there be a resolution proposed by at least one-third of all the members of the National Assembly and passed by a two-thirds majority of all the members of the National Assembly disapproving any such action and resolving to review, reverse or correct it.
- (10) Notwithstanding the review, reversal or correction of any action in terms of Sub-Article (9) hereof, all actions performed pursuant to any such action during the period preceding such review, reversal or correction shall be deemed to be valid and effective in law, until and unless Parliament otherwise enacts.

Article 33 Remuneration

Provision shall be made by Act of Parliament for the payment out of the State Revenue Fund of remuneration and allowances for the President, as well as for the payment of pensions to former Presidents and, in the case of their deaths, to their surviving spouses.

Article 34 Succession

- (1) If the office of President becomes vacant or if the President is otherwise unable to fulfil the duties of the office, the following persons shall in the order provided for in this Sub-Article act as President for the unexpired portion of the President's term of office or until the President is able to resume office, whichever is the earlier:
 - (a) the Prime Minister;
 - (b) the Deputy-Prime Minister;
 - (c) a person appointed by the Cabinet.
- (2) Where it is regarded as necessary or expedient that a person deputise for the President because of a temporary absence from the country or because of pressure of work, the President shall be entitled to nominate any person enumerated in Sub-Article (1) hereof to deputise for him or her in respect of such specific occasions or such specific matters and for such specific periods as in his or her discretion may be considered wise and expedient, subject to consultation with the Cabinet.

CHAPTER 6

The Cabinet

Article 35 Composition

- (1) The Cabinet shall consist of the President, the Prime Minister and such other Ministers as the President may appoint from the members of the National Assembly, including members nominated under Article 46(1)(b) hereof, for the purposes of administering and executing the functions of the Government.
- (2) The President may also appoint a Deputy-Prime Minister to perform such functions as may be assigned to him or her by the President or the Prime Minister.
- (3) The President or, in his or her absence, the Prime Minister or other Minister designated for this purpose by the President, shall preside at meetings of the Cabinet.

Article 36 Functions of the Prime Minister

The Prime Minister shall be the leader of Government business in Parliament, shall co-ordinate the work of the Cabinet and shall advise and assist the President in the execution of the functions of Government.

Article 37 Deputy-Ministers

The President may appoint from the members of the National Assembly, including members nominated under Article 46(1)(b) hereof, and the National Council such Deputy-Ministers as he or she may consider expedient, to exercise or perform on behalf of Ministers any of the powers, functions and duties which may have been assigned to such Ministers.

Article 38 Oath or Affirmation

Before assuming office, a Minister or Deputy-Minister shall make and subscribe to an oath or solemn affirmation before the President or a person designated by the President for this purpose, in the terms set out in Schedule 2 hereof.

Article 39 Vote of No Confidence

The President shall be obliged to terminate the appointment of any member of the Cabinet, if the National Assembly by a majority of all its members resolves that it has no confidence in that member.

Article 40 Duties and Functions

The members of the Cabinet shall have the following functions:

- (a) to direct, co-ordinate and supervise the activities of Ministries and Government departments including para-statal enterprises, and to review and advise the President and the National Assembly on the desirability and wisdom of any prevailing subordinate legislation, regulations or orders pertaining to such para-statal enterprises, regard being had to the public interest;
- (b) to initiate bills for submission to the National Assembly;
- (c) to formulate, explain and assess for the National Assembly the budget of the State and its economic development plans and to report to the National Assembly thereon;
- (d) to carry out such other functions as are assigned to them by law or are incidental to such assignment;
- (e) to attend meetings of the National Assembly and to be available for the purposes of any queries and debates pertaining to the legitimacy, wisdom, effectiveness and direction of Government policies;
- (f) to take such steps as are authorised by law to establish such economic organisations, institutions and para-statal enterprises on behalf of the State as are directed or authorised by law;
- (g) to formulate, explain and analyse for the members of the National Assembly the goals of Namibian foreign policy and its relations with other States and to report to the National Assembly thereon;
- (h) to formulate, explain and analyse for the members of the National Assembly the directions and content of foreign trade policy and to report to the National Assembly thereon;
- (i) to assist the President in determining what international agreements are to be concluded, acceded to or succeeded to and to report to the National Assembly thereon;
- (j) to advise the President on the state of national defence and the maintenance of law and order and to inform the National Assembly thereon;
- (k) to issue notices, instructions and directives to facilitate the implementation and administration of laws administered by the Executive, subject to the terms of this Constitution or any other law;
- (l) to remain vigilant and vigorous for the purposes of ensuring that the scourges of apartheid, tribalism and colonialism do not again manifest themselves in any form in a free and independent Namibia and to protect and assist disadvantaged citizens of Namibia who have historically been the victims of these pathologies.

Article 41 Ministerial Accountability

All Ministers shall be accountable individually for the administration of their own Ministries and collectively for the administration of the work of the Cabinet, both to the President and to Parliament.

Article 42 Outside Employment

- (1) During their tenure of office as members of the Cabinet, Ministers may not take up any other paid employment, engage in activities inconsistent with their positions as Ministers, or expose themselves to any situation which carries with it the risk of a conflict developing between their interests as Ministers and their private interests.
- (2) No members of the Cabinet shall use their positions as such or use information entrusted to them confidentially as such members of the Cabinet, directly or indirectly to enrich themselves.

Article 43 Secretary to the Cabinet

- (1) There shall be a Secretary to the Cabinet who shall be appointed by the President and who shall perform such functions as may be determined by law and such functions as are from time to time assigned to the Secretary by the President or the Prime Minister. Upon appointment by the President, the Secretary shall be deemed to have been appointed to such office on the recommendation of the Public Service Commission.
- (2) The Secretary to the Cabinet shall also serve as a depository of the records, minutes and related documents of the Cabinet.

CHAPTER 7

The National Assembly

Article 44 Legislative Power

The legislative power of Namibia shall be vested in the National Assembly with the power to pass laws with the assent of the President as provided in this Constitution subject, where applicable, to the powers and functions of the National Council as set out in this Constitution.

Article 45 Representative Nature

The members of the National Assembly shall be representative of all the people and shall in the performance of their duties be guided by the objectives of this Constitution, by the public interest and by their conscience.

Article 46 Composition

- (1) The composition of the National Assembly shall be as follows:
- (a) seventy-two (72) members to be elected by the registered voters by general, direct and secret ballot. Every Namibian citizen who has the qualifications described in Article 17 hereof shall be entitled to vote in the elections for members of the National Assembly and, subject to Article 47 hereof, shall be eligible for candidature as a member of the National Assembly;
 - (b) not more than six (6) persons appointed by the President under Article 32(5)(c) hereof, by virtue of their special expertise, status, skill or experience: provided that such members shall have no vote in the National Assembly, and shall not be taken into account for the purpose of determining any specific majorities that are required under this Constitution or any other law.
- (2) Subject to the principles referred to in Article 49 hereof, the members of the National Assembly referred to in Sub-Article (1)(a) hereof shall be elected in accordance with procedures to be determined by Act of Parliament.

Article 47 Disqualification of Members

- (1) No persons may become members of the National Assembly if they:
- (a) have at any time after Independence been convicted of any offence in Namibia, or outside Namibia if such conduct would have constituted an offence within Namibia, and for which they have been sentenced to death or to imprisonment of more than twelve (12) months without the option of a fine, unless they have received a free pardon or unless such imprisonment has expired at least ten (10) years before the date of their election; or
 - (b) have at any time prior to Independence been convicted of an offence, if such conduct would have constituted an offence within Namibia after Independence, and for which they have been sentenced to death or to imprisonment of more than twelve (12) months without the option of a fine, unless they have received a free pardon or unless such imprisonment has expired at least ten (10) years before the date of their election: provided that no person sentenced to death or imprisonment for acts committed in connection with the struggle for the independence of Namibia shall be disqualified under this Sub-Article from being elected as a member of the National Assembly; or
 - (c) are unrehabilitated insolvents; or
 - (d) are of unsound mind and have been so declared by a competent Court: or
 - (e) are remunerated members of the public service of Namibia; or
 - (f) are members of the National Council, Regional Councils or Local Authorities.

- (2) For the purposes of Sub-Article (1) hereof:
- (a) no person shall be considered as having been convicted by any Court until any appeal which might have been noted against the conviction or sentence has been determined, or the time for noting an appeal against such conviction has expired;
 - (b) the public service shall be deemed to include the defence force, the police force, the prison service, para-statal enterprises, Regional Councils and Local Authorities.

Article 48 Vacation of Seats

- (1) Members of the National Assembly shall vacate their seats:
- (a) if they cease to have the qualifications which rendered them eligible to be members of the National Assembly;
 - (b) if the political party which nominated them to sit in the National Assembly informs the Speaker that such members are no longer members of such political party;
 - (c) if they resign their seats in writing addressed to the Speaker;
 - (d) if they are removed by the National Assembly pursuant to its rules and standing orders permitting or requiring such removal for good and sufficient reasons;
 - (e) if they are absent during sittings of the National Assembly for ten (10) consecutive sitting days, without having obtained the special leave of the National Assembly on grounds specified in its rules and standing orders.
- (2) If the seat of a member of the National Assembly is vacated in terms of Sub Article (1) hereof, the political party which nominated such member to sit in the National Assembly shall be entitled to fill the vacancy by nominating any person on the party's election list compiled for the previous general election, or if there be no such person, by nominating any member of the party.

Article 49 Elections

The election of members in terms of Article 46(1)(a) hereof shall be on party lists and in accordance with the principles of proportional representation as set out in Schedule 4 hereof.

Article 50 Duration

Every National Assembly shall continue for a maximum period of five (5) years, but it may before the expiry of its term be dissolved by the President by Proclamation as provided for in Articles 32(3)(a) and 57(1) hereof.

Article 51 Speaker

- (1) At the first sitting of a newly elected National Assembly, the National Assembly, with the Secretary acting as Chairperson, shall elect a member as Speaker. The National Assembly shall then elect another member as Deputy-Speaker. The Deputy-Speaker shall act as Speaker whenever the Speaker is not available.
- (2) The Speaker or Deputy-Speaker shall cease to hold office if he or she ceases to be a member of the National Assembly. The Speaker or Deputy-Speaker may be removed from office by resolution of the National Assembly, and may resign from office or from the National Assembly in writing addressed to the Secretary of the National Assembly.
- (3) When the office of Speaker or Deputy-Speaker becomes vacant the National Assembly shall elect a member to fill the vacancy.
- (4) When neither the Speaker nor the Deputy-Speaker is available for duty, the National Assembly, with the Secretary acting as Chairperson, shall elect a member to act as Speaker.

Article 52 Secretary and other Officers

- (1) Subject to the provisions of the laws pertaining to the public service and the directives of the National Assembly, the Speaker shall appoint a person (or designate a person in the public service made available for that purpose), as the Secretary of the National Assembly, who shall perform the functions and duties assigned to such Secretary by this Constitution or by the Speaker.
- (2) Subject to the laws governing the control of public monies, the Secretary shall perform his or her functions and duties under the control of the Speaker.
- (3) The Secretary shall be assisted by officers of the National Assembly who shall be persons in the public service made available for that purpose.

Article 53 Quorum

The presence of at least thirty-seven (37) members of the National Assembly entitled to vote, other than the Speaker or the presiding member, shall be necessary to constitute a meeting of the National Assembly for the exercise of its powers and the performance of its functions.

Article 54 Casting Vote

In the case of an equality of votes in the National Assembly, the Speaker or the Deputy-Speaker or the presiding member shall have and may exercise a casting vote.

Article 55 Oath or Affirmation

Every member of the National Assembly shall make and subscribe to an oath or solemn

affirmation before the Chief Justice or a Judge designated by the Chief Justice for this purpose, in the terms set out in Schedule 3 hereof.

Article 56 Assent to Bills

- (1) Every bill passed by Parliament in terms of this Constitution in order to acquire the status of an Act of Parliament shall require the assent of the President to be signified by the signing of the bill and the publication of the Act in the Gazette.
- (2) Where a bill is passed by a majority of two-thirds of all the members of the National Assembly and has been confirmed by the National Council the President shall be obliged to give his or her assent thereto.
- (3) Where a bill is passed by a majority of the members of the National Assembly but such majority consists of less than two-thirds of all the members of the National Assembly and has been confirmed by the National Council, but the President declines to assent to such bill, the President shall communicate such dissent to the Speaker.
- (4) If the President has declined to assent to a bill under Sub-Article (3) hereof, the National Assembly may reconsider the bill and, if it so decides, pass the bill in the form in which it was referred back to it, or in an amended form or it may decline to pass the bill. Should the bill then be passed by a majority of the National Assembly it will not require further confirmation by the National Council but, if the majority consists of less than two-thirds of all the members of the National Assembly, the President shall retain his or her power to withhold assent to the bill. If the President elects not to assent to the bill, it shall then lapse.

Article 57 Dissolution

- (1) The National Assembly may be dissolved by the President on the advice of the Cabinet if the Government is unable to govern effectively.
- (2) Should the National Assembly be dissolved a national election for a new National Assembly and a new President shall take place within a period of ninety (90) days from the date of such dissolution.

Article 58 Conduct of Business after Dissolution

Notwithstanding the provisions of Article 57 hereof:

- (a) every person who at the date of its dissolution was a member of the National Assembly shall remain a member of the National Assembly and remain competent to perform the functions of a member until the day immediately preceding the first polling day for the election held in pursuance of such dissolution;
- (b) the President shall have power to summon Parliament for the conduct of business during the period following such dissolution, up to and including the day immediately preceding the first polling day for the election held in

pursuance of such dissolution, in the same manner and in all respects as if the dissolution had not occurred.

Article 59 Rules of Procedure, Committees and Standing Orders

- (1) The National Assembly may make such rules of procedure for the conduct of its business and proceedings and may also make such rules for the establishing, functioning and procedures of committees, and formulate such standing orders, as may appear to it to be expedient or necessary.
- (2) The National Assembly shall in its rules of procedure make provision for such disclosure as may be considered to be appropriate in regard to the financial or business affairs of its members.
- (3) For the purposes of exercising its powers and performing its functions any committee of the National Assembly established in terms of Sub-Article (1) hereof shall have the power to subpoena persons to appear before it to give evidence on oath and to produce any documents required by it.

Article 60 Duties, Privileges and Immunities of Members

- (1) The duties of the members of the National Assembly shall include the following:
 - (a) all members of the National Assembly shall maintain the dignity and image of the National Assembly both during the sittings of the National Assembly as well as in their acts and activities outside the National Assembly;
 - (b) all members of the National Assembly shall regard themselves as servants of the people of Namibia and desist from any conduct by which they seek improperly to enrich themselves or alienate themselves from the people.
- (2) A private members' bill may be introduced in the National Assembly if supported by one-third of all the members of the National Assembly.
- (3) Rules providing for the privileges and immunities of members of the National Assembly shall be made by Act of Parliament and all members shall be entitled to the protection of such privileges and immunities.

Article 61 Public Access to Sittings

- (1) Save as provided in Sub-Article (2) hereof, all meetings of the National Assembly shall be held in public and members of the public shall have access to such meetings.
- (2) Access by members of the public in terms of Sub-Article (1) hereof may be denied if the National Assembly adopts a motion supported by two-thirds of all its members excluding such access to members of the public for specified periods or in respect of specified matters. Such a motion shall only be considered if it is supported by at least one-tenth of all the members of the National Assembly and the debate on such motion shall not be open to members of the public.

Article 62 Sessions

- (1) The National Assembly shall sit:
 - (a) at its usual place of sitting determined by the National Assembly, unless the Speaker directs otherwise on the grounds of public interest, security or convenience;
 - (b) for at least two (2) sessions during each year, to commence and terminate on such dates as the National Assembly from time to time determines;
 - (c) for such special sessions as directed by Proclamation by the President from time to time.
- (2) During such sessions the National Assembly shall sit on such days and during such times of the day or night as the National Assembly by its rules and standing orders may provide.
- (3) The day of commencement of any session of the National Assembly may be altered by Proclamation by the President, if the President is requested to do so by the Speaker on grounds of public interest or convenience.

Article 63 Functions and Powers

- (1) The National Assembly, as the principal legislative authority in and over Namibia, shall have the power, subject to this Constitution, to make and repeal laws for the peace, order and good government of the country in the best interest of the people of Namibia.
- (2) The National Assembly shall further have the power and function, subject to this Constitution:
 - (a) to approve budgets for the effective government and administration of the country;
 - (b) to provide for revenue and taxation;
 - (c) to take such steps as it considers expedient to uphold and defend this Constitution and the laws of Namibia and to advance the objectives of Namibian independence;
 - (d) to consider and decide whether or not to succeed to such international agreements as may have been entered into prior to Independence by administrations within Namibia in which the majority of the Namibian people have historically not enjoyed democratic representation and participation;
 - (e) to agree to the ratification of or accession to international agreements which have been negotiated and signed in terms of Article 32(3)(e) hereof;
 - (f) to receive reports on the activities of the Executive, including para-statal enterprises, and from time to time to require any senior official thereof to appear before any of the committees of the National Assembly to account for and explain his or her acts and programmes;

- (g) to initiate, approve or decide to hold a referendum on matters of national concern;
- (h) to debate and to advise the President in regard to any matters which by this Constitution the President is authorised to deal with;
- (i) to remain vigilant and vigorous for the purposes of ensuring that the scourges of apartheid, tribalism and colonialism do not again manifest themselves in any form in a free and independent Namibia and to protect and assist disadvantaged citizens of Namibia who have historically been the victims of these pathologies;
- (j) generally to exercise any other functions and powers assigned to it by this Constitution or any other law and any other functions incidental thereto.

Article 64 Withholding of Presidential Assent

- (1) Subject to the provisions of this Constitution, the President shall be entitled to withhold his or her assent to a bill approved by the National Assembly if in the President's opinion such bill would upon adoption conflict with the provisions of this Constitution.
- (2) Should the President withhold assent on the grounds of such opinion, he or she shall so inform the Speaker who shall inform the National Assembly thereof, and the Attorney-General, who may then take appropriate steps to have the matter decided by a competent Court.
- (3) Should such Court thereafter conclude that such bill is not in conflict with the provisions of this Constitution, the President shall assent to the said bill if it was passed by the National Assembly by a two-thirds majority of all its members. If the bill was not passed with such majority, the President may withhold his or her assent to the bill, in which event the provisions of Article 56(3) and (4) hereof shall apply.
- (4) Should such Court conclude that the disputed bill would be in conflict with any provisions of this Constitution, the said bill shall be deemed to have lapsed and the President shall not be entitled to assent thereto.

Article 65 Signature and Enrolment of Acts

- (1) When any bill has become an Act of Parliament as a result of its having been passed by Parliament, signed by the President and published in the Gazette, the Secretary of the National Assembly shall promptly cause two (2) fair copies of such Act in the English language to be enrolled in the office of the Registrar of the Supreme Court and such copies shall be conclusive evidence of the provisions of the Act.
- (2) The public shall have the right of access to such copies subject to such regulations as may be prescribed by Parliament to protect the durability of the said copies and the convenience of the Registrar's staff.

Article 66 Customary and Common Law

- (1) Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.
- (2) Subject to the terms of this Constitution, any part of such common law or customary law may be repealed or modified by Act of Parliament, and the application thereof may be confined to particular parts of Namibia or to particular periods.

Article 67 Requisite Majorities

Save as provided in this Constitution, a simple majority of votes cast in the National Assembly shall be sufficient for the passage of any bill or resolution of the National Assembly.

CHAPTER 8

The National Council

Article 68 Establishment

There shall be a National Council which shall have the powers and functions set out in this Constitution.

Article 69 Composition

- (1) The National Council shall consist of two (2) members from each region referred to in Article 102 hereof, to be elected from amongst their members by the Regional Council for such region.
- (2) The elections of members of the National Council shall be conducted according to procedures to be prescribed by Act of Parliament.

Article 70 Term of Office of Members

- (1) Members of the National Council shall hold their seats for six (6) years from the date of their election and shall be eligible for re-election.
- (2) When a seat of a member of the National Council becomes vacant through death, resignation or disqualification, an election for a successor to occupy the vacant seat until the expiry of the predecessor's term of office shall be held, except in the instance where such vacancy arises less than six (6) months before the expiry of

the term of the National Council, in which instance such vacancy need not be filled. Such election shall be held in accordance with the procedures prescribed by the Act of Parliament referred to in Article 69(2) hereof.

Article 71 Oath or Affirmation

Every member of the National Council shall make and subscribe to an oath or solemn affirmation before the Chief Justice, or a Judge designated by the Chief Justice for this purpose, in the terms set out in Schedule 3 hereof.

Article 72 Qualifications of Members

No person shall be qualified to be a member of the National Council if he or she is an elected member of a Local Authority, and unless he or she is qualified under Article 47(1)(a) to (e) hereof to be a member of the National Assembly.

Article 73 Chairperson and Vice-Chairperson

The National Council shall, before proceeding to the dispatch of any other business, elect from its members a Chairperson and a Vice-Chairperson. The Chairperson, or in his or her absence the Vice-Chairperson, shall preside over sessions of the National Council. Should neither the Chairperson nor the Vice Chairperson be present at any session, the National Council shall elect from amongst its members a person to act as Chairperson in their absence during that session.

Article 74 Powers and Functions

- (1) The National Council shall have the power to:
 - (a) consider in terms of Article 75 hereof all bills passed by the National Assembly;
 - (b) investigate and report to the National Assembly on any subordinate legislation, reports and documents which under law must be tabled in the National Assembly and which are referred to it by the National Assembly for advice;
 - (c) recommend legislation on matters of regional concern for submission to and consideration by the National Assembly;
 - (d) perform any other functions assigned to it by the National Assembly or by an Act of Parliament.
- (2) The National Council shall have the power to establish committees and to adopt its own rules and procedures for the exercise of its powers and the performance of its functions. A committee of the National Council shall be entitled to conduct all such hearings and collect such evidence as it considers necessary for the exercise of the National Council's powers of review and investigations, and for

- such purposes shall have the powers referred to in Article 59(3) hereof.
- (3) The National Council shall in its rules of procedure make provision for such disclosure as may be considered to be appropriate in regard to the financial or business affairs of its members.
 - (4) The duties of the members of the National Council shall include the following:
 - (a) all members of the National Council shall maintain the dignity and image of the National Council both during the sittings of the National Council as well as in their acts and activities outside the National Council;
 - (b) all members of the National Council shall regard themselves as servants of the people of Namibia and desist from any conduct by which they seek improperly to enrich themselves or alienate themselves from the people.
 - (5) Rules providing for the privileges and immunities of members of the National Council shall be made by Act of Parliament and all members shall be entitled to the protection of such privileges and immunities.

Article 75 Review of Legislation

- (1) All bills passed by the National Assembly shall be referred by the Speaker to the National Council.
- (2) The National Council shall consider bills referred to it under Sub-Article (1) hereof and shall submit reports thereon with its recommendations to the Speaker.
- (3) If in its report to the Speaker the National Council confirms a bill, the Speaker shall refer it to the President to enable the President to deal with it under Articles 56 and 64 hereof.
- (4)
 - (a) If the National Council in its report to the Speaker recommends that the bill be passed subject to amendments proposed by it, such bill shall be referred by the Speaker back to the National Assembly.
 - (b) If a bill is referred back to the National Assembly under Sub-Article (a) hereof, the National Assembly may reconsider the bill and may make any amendments thereto, whether proposed by the National Council or not. If the bill is again passed by the National Assembly, whether in the form in which it was originally passed, or in an amended form, the bill shall not again be referred to the National Council, but shall be referred by the Speaker to the President to enable it to be dealt with under Articles 56 and 64 hereof.
- (5)
 - (a) If a majority of two-thirds of all the members of the National Council objects to the principle of a bill, this shall be mentioned in its report to the Speaker. In that event, the report shall also indicate whether or not the National Council proposes that amendments be made to the bill, if the principle of the bill is confirmed by the National Assembly under Sub-Article (b) hereof, and if amendments are proposed, details thereof shall be set out in the report.
 - (b) If the National Council in its report objects to the principle of the bill, the

National Assembly shall be required to reconsider the principle. If upon such reconsideration the National Assembly reaffirms the principle of the bill by a majority of two-thirds of all its members, the principle of the bill shall no longer be an issue. If such two-thirds majority is not obtained in the National Assembly, the bill shall lapse.

- (6) (a) If the National Assembly reaffirms the principle of the bill under Sub-Article 5(b) hereof by a majority of two-thirds of all its members, and the report of the National Council proposed that in such event amendments be made to the bill, the National Assembly shall then deal with the amendments proposed by the National Council, and in that event the provisions of Sub-Article 4(b) shall apply mutatis mutandis.
(b) If the National Assembly reaffirms the principle of the bill under Sub-Article 5(b) hereof by a majority of two-thirds of all its members, and the report of the National Council did not propose that in such event amendments be made to the bill, the National Council shall be deemed to have confirmed the bill, and the Speaker shall refer the bill to the President to be dealt with under Articles 56 and 64 hereof.
- (7) Sub-Articles (5) and (6) hereof shall not apply to bills dealing with the levying of taxes or the appropriation of public monies.
- (8) The National Council shall report to the Speaker on all bills dealing with the levying of taxes or appropriations of public monies within thirty (30) days of the date on which such bills were referred to it by the Speaker, and on all other bills within three (3) months of the date of referral by the Speaker, failing which the National Council will be deemed to have confirmed such bills and the Speaker shall then refer them promptly to the President to enable the President to deal with the bills under Articles 56 and 64 hereof.
- (9) If the President withholds his or her assent to any bill under Article 56 hereof and the bill is then dealt with in terms of that Article, and is again passed by the National Assembly in the form in which it was originally passed or in an amended form, such bill shall not again be referred to the National Council, but shall be referred by the Speaker directly to the President to enable the bill to be dealt with in terms of Articles 56 and 64 hereof.

Article 76 Quorum

The presence of a majority of the members of the National Council shall be necessary to constitute a meeting of the National Council for the exercise of its powers and the performance of its functions.

Article 77 Voting

Save as is otherwise provided in this Constitution, all questions in the National Council shall be determined by a majority of the votes cast by members present other than the Chairperson, or in his or her absence the Vice-Chairperson or the member presiding at that session, who shall, however, have and may exercise a casting vote in the case of an equality of votes.

CHAPTER 9

The Administration of Justice

Article 78 The Judiciary

- (1) The judicial power shall be vested in the Courts of Namibia, which shall consist of:
 - (a) a Supreme Court of Namibia;
 - (b) a High Court of Namibia;
 - (c) Lower Courts of Namibia.
- (2) The Courts shall be independent and subject only to this Constitution and the law.
- (3) No member of the Cabinet or the Legislature or any other person shall interfere with Judges or judicial officers in the exercise of their judicial functions, and all organs of the State shall accord such assistance as the Courts may require to protect their independence, dignity and effectiveness, subject to the terms of this Constitution or any other law.
- (4) The Supreme Court and the High Court shall have the inherent jurisdiction which vested in the Supreme Court of South-West Africa immediately prior to the date of Independence, including the power to regulate their own procedures and to make court rules for that purpose.

Article 79 The Supreme Court

- (1) The Supreme Court shall consist of a Chief Justice and such additional Judges as the President, acting on the recommendation of the Judicial Service Commission, may determine.
- (2) The Supreme Court shall be presided over by the Chief Justice and shall hear and adjudicate upon appeals emanating from the High Court, including appeals which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder. The Supreme Court shall also deal with matters referred to it for decision by the Attorney-General under this Constitution, and with such other matters as may be authorised by Act of Parliament.
- (3) Three (3) Judges shall constitute a quorum of the Supreme Court when it hears appeals or deals with matters referred to it by the Attorney-General under this Constitution: provided that provision may be made by Act of Parliament for a lesser quorum in circumstances in which a Judge seized of an appeal dies or becomes unable to act at any time prior to judgment.
- (4) The jurisdiction of the Supreme Court with regard to appeals shall be determined by Act of Parliament.

Article 80 The High Court

- (1) The High Court shall consist of a Judge-President and such additional Judges as the President, acting on the recommendation of the Judicial Service Commission, may determine.
- (2) The High Court shall have original jurisdiction to hear and adjudicate upon all civil disputes and criminal prosecutions, including cases which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder. The High Court shall also have jurisdiction to hear and adjudicate upon appeals from Lower Courts.
- (3) The jurisdiction of the High Court with regard to appeals shall be determined by Act of Parliament.

Article 81 Binding Nature of Decisions of the Supreme Court

A decision of the Supreme Court shall be binding on all other Courts of Namibia and all persons in Namibia unless it is reversed by the Supreme Court itself, or is contradicted by an Act of Parliament lawfully enacted.

Article 82 Appointment of Judges

- (1) All appointments of Judges to the Supreme Court and the High Court shall be made by the President on the recommendation of the Judicial Service Commission and upon appointment Judges shall make an oath or affirmation of office in the terms set out in Schedule 1 hereof.
- (2) At the request of the Chief Justice the President may appoint Acting Judges of the Supreme Court to fill casual vacancies in the Court from time to time, or as ad hoc appointments to sit in cases involving constitutional issues or the guarantee of fundamental rights and freedoms, if in the opinion of the Chief Justice it is desirable that such persons should be appointed to hear such cases by reason of their special knowledge of or expertise in such matters.
- (3) At the request of the Judge-President, the President may appoint Acting Judges of the High Court from time to time to fill casual vacancies in the Court, or to enable the Court to deal expeditiously with its work.
- (4) All Judges, except Acting Judges, appointed under this Constitution shall hold office until the age of sixty-five (65) but the President shall be entitled to extend the retiring age of any Judge to seventy (70). It shall also be possible by Act of Parliament to make provision for retirement at ages higher than those specified in this Article.

Article 83 Lower Courts

- (1) Lower Courts shall be established by Act of Parliament and shall have the jurisdiction and adopt the procedures prescribed by such Act and regulations made thereunder.

- (2) Lower Courts shall be presided over by Magistrates or other judicial Officers appointed in accordance with procedures prescribed by Act of Parliament.

Article 84 Removal of Judges from Office

- (1) A Judge may be removed from office before the expiry of his or her tenure only by the President acting on the recommendation of the Judicial Service Commission.
- (2) Judges may only be removed from office on the ground of mental incapacity or for gross misconduct, and in accordance with the provisions of Sub-Article (3) hereof.
- (3) The Judicial Service Commission shall investigate whether or not a Judge should be removed from office on such grounds, and if it decides that the Judge should be removed, it shall inform the President of its recommendation.
- (4) If the deliberations of the Judicial Service Commission pursuant to this Article involve the conduct of a member of the Judicial Service Commission, such Judge shall not participate in the deliberations and the President shall appoint another Judge to fill such vacancy.
- (5) While investigations are being carried out into the necessity of the removal of a Judge in terms of this Article, the President may, on the recommendation of the Judicial Service Commission and, pending the outcome of such investigations and recommendation, suspend the Judge from office.

Article 85 The Judicial Service Commission

- (1) There shall be a Judicial Service Commission consisting of the Chief Justice, a Judge appointed by the President, the Attorney-General and two members of the legal profession nominated in accordance with the provisions of an Act of Parliament by the professional organisation or organisations representing the interests of the legal profession in Namibia.
- (2) The Judicial Service Commission shall perform such functions as are prescribed for it by this Constitution or any other law.
- (3) The Judicial Service Commission shall be entitled to make such rules and regulations for the purposes of regulating its procedures and functions as are not inconsistent with this Constitution or any other law.
- (4) Any casual vacancy in the Judicial Service Commission may be filled by the Chief Justice or in his or her absence by the Judge appointed by the President.

Article 86 The Attorney-General

There shall be an Attorney-General appointed by the President in accordance with the provisions of Article 32(3)(i)(cc) hereof.

Article 87 Powers and Functions of the Attorney-General

The powers and functions of the Attorney-General shall be:

- (a) to exercise the final responsibility for the office of the Prosecutor-General;
- (b) to be the principal legal adviser to the President and Government;
- (c) to take all action necessary for the protection and upholding of the Constitution;
- (d) to perform all such functions and duties as may be assigned to the Attorney-General by Act of Parliament.

Article 88 The Prosecutor-General

- (1) There shall be a Prosecutor-General appointed by the President on the recommendation of the Judicial Service Commission. No person shall be eligible for appointment as Prosecutor-General unless such person:
 - (a) possesses legal qualifications that would entitle him or her to practise in all the Courts of Namibia;
 - (b) is, by virtue of his or her experience, conscientiousness and integrity a fit and proper person to be entrusted with the responsibilities of the office of Prosecutor-General.
 - (2) The powers and functions of the Prosecutor-General shall be:
 - (a) to prosecute, subject to the provisions of this Constitution, in the name of the Republic of Namibia in criminal proceedings;
 - (b) to prosecute and defend appeals in criminal proceedings in the High Court and the Supreme Court;
 - (c) to perform all functions relating to the exercise of such powers;
 - (d) to delegate to other officials, subject to his or her control and direction, authority to conduct criminal proceedings in any Court;
 - (e) to perform all such other functions as may be assigned to him or her in terms of any other law.
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CHAPTER 10

The Ombudsman

Article 89 Establishment and Independence

- (1) There shall be an Ombudsman, who shall have the powers and functions set out in this Constitution.
- (2) The Ombudsman shall be independent and subject only to this Constitution and the law.
- (3) No member of the Cabinet or the Legislature or any other person shall interfere with the Ombudsman in the exercise of his or her functions and all organs of the State shall accord such assistance as may be needed for the protection of the independence, dignity and effectiveness of the Ombudsman.
- (4) The Ombudsman shall either be a Judge of Namibia, or a person possessing the legal qualifications which would entitle him or her to practise in all the Courts of Namibia.

Article 90 Appointment and Term of Office

- (1) The Ombudsman shall be appointed by Proclamation by the President on the recommendation of the Judicial Service Commission.
- (2) The Ombudsman shall hold office until the age of sixty-five (65) but the President may extend the retiring age of any Ombudsman to seventy (70).

Article 91 Functions

The functions of the Ombudsman shall be defined and prescribed by an Act of Parliament and shall include the following:

- (a) the duty to investigate complaints concerning alleged or apparent instances of violations of fundamental rights and freedoms, abuse of power, unfair, harsh, insensitive or discourteous treatment of an inhabitant of Namibia by an official in the employ of any organ of Government (whether central or local), manifest injustice, or corruption or conduct by such official which would properly be regarded as unlawful, oppressive or unfair in a democratic society;
- (b) the duty to investigate complaints concerning the functioning of the Public Service Commission, administrative organs of the State, the defence force, the police force and the prison service in so far as such complaints relate to the failure to achieve a balanced structuring of such services or equal access by all to the recruitment of such services or fair administration in relation to such services;
- (c) the duty to investigate complaints concerning the over-utilization of living natural resources, the irrational exploitation of non-renewable resources,

the degradation and destruction of ecosystems and failure to protect the beauty and character of Namibia;

(d) the duty to investigate complaints concerning practices and actions by persons, enterprises and other private institutions where such complaints allege that violations of fundamental rights and freedoms under this Constitution have taken place;

(e) the duty and power to take appropriate action to call for the remedying, correction and reversal of instances specified in the preceding Sub-Articles through such means as are fair, proper and effective, including:

(aa) negotiation and compromise between the parties concerned;

(bb) causing the complaint and his or her finding thereon to be reported to the superior of an offending person;

(cc) referring the matter to the Prosecutor-General;

(dd) bringing proceedings in a competent Court for an interdict or some other suitable remedy to secure the termination of the offending action or conduct, or the abandonment or alteration of the offending procedures;

(ee) bringing proceedings to interdict the enforcement of such legislation or regulation by challenging its validity if the offending action or conduct is sought to be justified by subordinate legislation or regulation which is grossly unreasonable or otherwise ultra vires;

(ff) reviewing such laws as were in operation before the date of Independence in order to ascertain whether they violate the letter or the spirit of this Constitution and to make consequential recommendations to the President, the Cabinet or the

Attorney-General for appropriate action following thereupon;

(f) the duty to investigate vigorously all instances of alleged or suspected corruption and the misappropriation of public monies by officials and to take appropriate steps, including reports to the Prosecutor-General and the Auditor-General pursuant thereto;

(g) the duty to report annually to the National Assembly on the exercise of his or her powers and functions.

Article 92 Powers of Investigation

The powers of the Ombudsman shall be defined by Act of Parliament and shall include the power:

(a) to issue subpoenas requiring the attendance of any person before the Ombudsman and the production of any document or record relevant to any investigation by the Ombudsman;

(b) to cause any person contemptuous of any such subpoena to be prosecuted before a competent Court;

- (c) to question any person;
- (d) to require any person to cooperate with the Ombudsman and to disclose truthfully and frankly any information within his or her knowledge relevant to any investigation of the Ombudsman.

Article 93 Meaning of "Official"

For the purposes of this Chapter the word "official" shall, unless the context otherwise indicates, include any elected or appointed official or employee of any organ of the central or local Government, any official of a para-statal enterprise owned or managed or controlled by the State, or in which the State or the Government has substantial interest, or any officer of the defence force, the police force or the prison service, but shall not include a Judge of the Supreme Court or the High Court or, in so far as a complaint concerns the performance of a judicial function, any other judicial officer.

Article 94 Removal from Office

- (1) The Ombudsman may be removed from office before the expiry of his or her term of office by the President acting on the recommendation of the Judicial Service Commission.
- (2) The Ombudsman may only be removed from office on the ground of mental incapacity or for gross misconduct, and in accordance with the provisions of Sub-Article (3) hereof.
- (3) The Judicial Service Commission shall investigate whether or not the Ombudsman shall be removed from office on the grounds referred to in Sub Article (2) hereof and, if it decides that the Ombudsman shall be removed, it shall inform the President of its recommendation.
- (4) While investigations are being carried out into the necessity of the removal of the Ombudsman in terms of this Article, the President may, on the recommendation of the Judicial Service Commission and, pending the outcome of such investigations and recommendation, suspend the Ombudsman from office.

CHAPTER 11

Principles of State Policy

Article 95 Promotion of the Welfare of the People

The State shall actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at the following:

- (a) enactment of legislation to ensure equality of opportunity for women, to enable them to participate fully in all spheres of Namibian society; in particular, the Government shall ensure the implementation of the principle of non-discrimination in remuneration of men and women; further, the

Government shall seek, through appropriate legislation, to provide maternity and related benefits for women;

- (b) enactment of legislation to ensure that the health and strength of the workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter vocations unsuited to their age and strength;
- (c) active encouragement of the formation of independent trade unions to protect workers' rights and interests, and to promote sound labour relations and fair employment practices;
- (d) membership of the International Labour Organisation (ILO) and, where possible, adherence to and action in accordance with the international Conventions and Recommendations of the ILO;
- (e) ensurance that every citizen has a right to fair and reasonable access to public facilities and services in accordance with the law;
- (f) ensurance that senior citizens are entitled to and do receive a regular pension adequate for the maintenance of a decent standard of living and the enjoyment of social and cultural opportunities;
- (g) enactment of legislation to ensure that the unemployed, the incapacitated, the indigent and the disadvantaged are accorded such social benefits and amenities as are determined by Parliament to be just and affordable with due regard to the resources of the State;
- (h) a legal system seeking to promote justice on the basis of equal opportunity by providing free legal aid in defined cases with due regard to the resources of the State;
- (i) ensurance that workers are paid a living wage adequate for the maintenance of a decent standard of living and the enjoyment of social and cultural opportunities;
- (j) consistent planning to raise and maintain an acceptable level of nutrition and standard of living of the Namibian people and to improve public health;
- (k) encouragement of the mass of the population through education and other activities and through their organisations to influence Government policy by debating its decisions;
- (l) maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future; in particular, the Government shall provide measures against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory.

Article 96 Foreign Relations

The State shall endeavour to ensure that in its international relations it:

- (a) adopts and maintains a policy of non-alignment;

- (b) promotes international cooperation, peace and security;
- (c) creates and maintains just and mutually beneficial relations among nations;
- (d) fosters respect for international law and treaty obligations;
- (e) encourages the settlement of international disputes by peaceful means.

Article 97 Asylum

The State shall, where it is reasonable to do so, grant asylum to persons who reasonably fear persecution on the ground of their political beliefs, race, religion or membership of a particular social group.

Article 98 Principles of Economic Order

- (1) The economic order of Namibia shall be based on the principles of a mixed economy with the objective of securing economic growth, prosperity and a life of human dignity for all Namibians.
- (2) The Namibian economy shall be based, inter alia, on the following forms of ownership:
 - (a) public;
 - (b) private;
 - (c) joint public-private;
 - (d) cc-operative;
 - (e) co-ownership;
 - (f) small-scale family.

Article 99 Foreign Investments

Foreign investments shall be encouraged within Namibia subject to the provisions of an Investment Code to be adopted by Parliament.

Article 100 Sovereign Ownership of Natural Resources

Land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned.

Article 101 Application of the Principles contained in this Chapter

The principles of state policy contained in this Chapter shall not of and by themselves be legally enforceable by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to have regard to the said principles in interpreting any laws based on them.

CHAPTER 12

Regional and Local Government

Article 102 Structures of Regional and Local Government

- (1) For purposes of regional and local government, Namibia shall be divided into regional and local units, which shall consist of such region and Local Authorities as may be determined and defined by Act of Parliament.
- (2) The delineation of the boundaries of the regions and Local Authorities referred to in Sub-Article (1) hereof shall be geographical only, without any reference to the race, colour or ethnic origin of the inhabitants of such areas.
- (3) Every organ of regional and local government shall have a Council as the principal governing body, freely elected in accordance with this Constitution and the Act of Parliament referred to in Sub-Article (1) hereof, with an executive and administration which shall carry out all lawful resolutions and policies of such Council, subject to this Constitution and any other relevant laws.
- (4) For the purposes of this Chapter, a Local Authority shall include all municipalities, communities, village councils and other organs of local government defined and constituted by Act of Parliament.
- (5) There shall be a Council of Traditional Leaders to be established in terms of an Act of Parliament in order to advise the President on the control and utilization of communal land and on all such other matters as may be referred to it by the President for advice.

Article 103 Establishment of Regional Councils

- (1) The boundaries of regions shall be determined by a Delimitation Commission in accordance with the principles set out in Article 102 (2) hereof.
- (2) The boundaries of regions may be changed from time to time and new regions may be created from time to time, but only in accordance with the recommendations of the Delimitation Commission.
- (3) A Regional Council shall be established for every region the boundaries of which have been determined in accordance with Sub-Articles (1) and (2) hereof.

Article 104 The Delimitation Commission

- (1) The Delimitation Commission shall consist of a Chairperson who shall be a Judge of the Supreme Court or the High Court, and two other persons to be appointed by the President with the approval of Parliament.
- (2) The Delimitation Commission shall discharge its duties in accordance with the provisions of an Act of Parliament and this Constitution, and shall report thereon to the President.

Article 105 Composition of Regional Councils

Every Regional Council shall consist of a number of persons determined by the Delimitation Commission for the particular region for which that Regional Council has been established, and who are qualified to be elected to the National Council.

Article 106 Regional Council Elections

- (1) Each region shall be divided into constituencies the boundaries of which shall be fixed by the Delimitation Commission in accordance with the provisions of an Act of Parliament and this Constitution: provided that there shall be no fewer than six (6) and no more than twelve (12) constituencies in each region.
- (2) Each constituency shall elect one member to the Regional Council for the region in which it is situated.
- (3) The elections shall be by secret ballot to be conducted in accordance with the provisions of an Act of Parliament, and the candidate receiving the most votes in any constituency shall be the elected member of the Regional Council for that constituency.
- (4) All Regional Council elections for the various regions of Namibia shall be held on the same day.
- (5) The date for Regional Council elections shall be determined by the President by Proclamation in the Gazette.

Article 107 Remuneration of Members of Regional Councils

The remuneration and allowances to be paid to members of Regional Councils shall be determined by Act of Parliament.

Article 108 Powers of Regional Councils

Regional Councils shall have the following powers:

- (a) to elect members to the National Council;
- (b) to exercise within the region for which they have been constituted such

executive powers and to perform such duties in connection therewith as may be assigned to them by Act of Parliament and as may be delegated to them by the President;

(c) to raise revenue, or share in the revenue raised by the central Government within the regions for which they have been established, as may be determined by Act of Parliament;

(d) to exercise powers, perform any other functions and make such by-laws or regulations as may be determined by Act of Parliament.

Article 109 Management Committees

- (1) Each Regional Council shall elect from amongst its members a Management Committee, which shall be vested with executive powers in accordance with the provisions of an Act of Parliament.
- (2) The Management Committee shall have a Chairperson to be elected by the members of the Regional Council at the time that they elect the Management Committee, and such Chairperson shall preside at meetings of his or her Regional Council.
- (3) The Chairperson and the members of the Management Committee shall hold office for three (3) years and shall be eligible for re-election.

Article 110 Administration and Functioning of Regional Councils

The holding and conducting of meetings of Regional Councils, the filling of casual vacancies on Regional Councils and the employment of officials by the Regional Councils, as well as all other matters dealing with or incidental to the administration and functioning of Regional Councils, shall be determined by Act of Parliament.

Article 111 Local Authorities

- (1) Local Authorities shall be established in accordance with the provisions of Article 102 hereof.
- (2) The boundaries of Local Authorities, the election of Councils to administer the affairs of Local Authorities, the method of electing persons to Local Authority Councils, the methods of raising revenue for Local Authorities, the remuneration of Local Authority Councillors and all other matters dealing with or incidental to the administration and functioning of Local Authorities, shall be determined by Act of Parliament.
- (3) Persons shall be qualified to vote in elections for Local Authority Councils if such persons have been resident within the jurisdiction of a Local Authority for not less than one (1) year immediately prior to such election and if such persons are qualified to vote in elections for the National Assembly.
- (4) Different provisions may be made by the Act of Parliament referred to in Sub-Article (2) hereof in regard to different types of Local Authorities.

- (5) All by-laws or regulations made by Local Authorities pursuant to powers vested in them by Act of Parliament shall be tabled in the National Assembly and shall cease to be of force if a resolution to that effect is passed by the National Assembly.

CHAPTER 13

The Public Service Commission

Article 112 Establishment

- (1) There shall be established a Public Service Commission which shall have the function of advising the President on the matters referred to in Article 113 hereof and of reporting to the National Assembly thereon.
- (2) The Public Service Commission shall be independent and act impartially.
- (3) The Public Service Commission shall consist of a Chairperson and no fewer than three (3) and no more than six (6) other persons nominated by the President and appointed by the National Assembly by resolution.
- (4) Every member of the Public Service Commission shall be entitled to serve on such Commission for a period of five (5) years unless lawfully removed before the expiry of that period for good and sufficient reasons in terms of this Constitution and procedures to be prescribed by Act of Parliament. Every member of the Public Service Commission shall be eligible for reappointment.

Article 113 Functions

The functions of the Public Service Commission shall be defined by Act of Parliament and shall include the power:

- (a) to advise the President and the Government or:
- (aa) the appointment of suitable persons to specified categories of employment in the public service, with special regard to the balanced structuring thereof;
 - (bb) the exercise of adequate disciplinary control over such persons in order to assure the fair administration of personnel policy;
 - (cc) the remuneration and the retirement benefits of any such persons;
 - (dd) all other matters which by law pertain to the public service;
- (b) to perform all functions assigned to it by Act of Parliament;
- (c) to advise the President on the identity, availability and suitability of persons to be appointed by the President to offices in terms of this Constitution or any other law.

CHAPTER 14

The Security Commission

Article 114 Establishment and Functions

- (1) There shall be a Security Commission which shall have the function of making recommendations to the President on the appointment of the Chief of the Defence Force, the Inspector-General of Police and the Commissioner of Prisons and such other functions as may be assigned to it by Act of Parliament.
 - (2) The Security Commission shall consist of the Chairperson of the Public Service Commission, the Chief of the Defence Force, the Inspector-General of Police, the Commissioner of Prisons and two (2) members of the National Assembly appointed by the President on the recommendation of the National Assembly.
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CHAPTER 15

The Police and Defence Forces and The Prison Service

Article 115 Establishment of the Police Force

There shall be established by Act of Parliament a Namibian police force with prescribed powers, duties and procedures in order to secure the internal security of Namibia and to maintain law and order.

Article 116 The Inspector-General of Police

- (1) There shall be an Inspector-General of Police who shall be appointed by the President in terms of Article 32 (4)(c)(bb) hereof.
- (2) The Inspector-General of Police shall make provision for a balanced structuring of the police force and shall have the power to make suitable appointments to the police force, to cause charges of indiscipline among members of the police force to be investigated and prosecuted and to ensure the efficient administration of the police force.

Article 117 Removal of the Inspector-General of Police

The President may remove the inspector-General of Police from office for good cause and in the public interest and in accordance with the provisions of any Act of Parliament which may prescribe procedures considered to be expedient for this purpose.

Article 118 Establishment of the Defence Force

- (1) There shall be established by Act of Parliament a Namibian Defence Force with prescribed composition, powers, duties and procedures, in order to defend the territory and national interests of Namibia.
- (2) The President shall be the Commander-in-Chief of the Defence Force and shall have all the powers and exercise all the functions necessary for that purpose.

Article 119 Chief of the Defence Force

- (1) There shall be a Chief of the Defence Force who shall be appointed by the President in terms of Article 32(4)(c)(aa) hereof.
- (2) The Chief of the Defence Force shall make provision for a balanced structuring of the defence force and shall have the power to make suitable appointments to the defence force, to cause charges of indiscipline among members of the defence force to be investigated and prosecuted and to ensure the efficient administration of the defence force.

Article 120 Removal of the Chief of the Defence Force

The President may remove the Chief of the Defence Force from office for good cause and in the public interest and in accordance with the provisions of any Act of Parliament which may prescribe procedures considered to be expedient for this purpose.

Article 121 Establishment of the Prison Service

There shall be established by Act of Parliament a Namibian prison service with prescribed powers, duties and procedures:

Article 122 Commissioner of Prisons

- (1) There shall be a Commissioner of Prisons who shall be appointed by the President in terms of Article 32(4)(c)(cc) hereof.
- (2) The Commissioner of Prisons shall make provision for a balanced structuring of the prison service and shall have the power to make suitable appointments to the prison service, to cause charges of indiscipline among members of the prison service to be investigated and prosecuted and to ensure the efficient administration of the prison service.

Article 123 Removal of the Commissioner of Prisons

The President may remove the Commissioner of Prisons from office for good cause and in the public interest and in accordance with the provisions of any Act of Parliament which may prescribe procedures considered to be expedient for this purpose.

CHAPTER 16

Finance

Article 124 Transfer of Government Assets

The assets mentioned in Schedule 5 hereof shall vest in the Government of Namibia on the date of Independence.

Article 125 The State Revenue Fund

- (1) The Central Revenue Fund of the mandated territory of South West Africa instituted in terms of Section 3 of the Exchequer and Audit Proclamation, 1979 (Proclamation 85 of 1979) and Section 31(1) of Proclamation R101 of 1985 shall continue as the State Revenue Fund of the Republic of Namibia.
- (2) All income accruing to the central Government shall be deposited in the State Revenue Fund and the authority to dispose thereof shall vest in the Government of Namibia.
- (3) Nothing contained in Sub-Article (2) hereof shall preclude the enactment of any law or the application of any law which provides that:
 - (a) the Government shall pay any particular monies accruing to it into a fund designated for a special purpose; or
 - (b) any body or institution to which any monies accruing to the State have been paid, may retain such monies or portions thereof for the purpose of defraying the expenses of such body or institution; or
 - (c) where necessary, subsidies be allocated to regional and Local Authorities.
- (4) No money shall be withdrawn from the State Revenue Fund except in accordance with an Act of Parliament.
- (5) No body or person other than the Government shall have the power to withdraw monies from the State Revenue Fund.

Article 126 Appropriations

- (1) The Minister in charge of the Department of Finance shall, at least once every year and thereafter at such interim stages as may be necessary, present for the consideration of the National Assembly estimates of revenue, expenditure and income for the prospective financial year.
- (2) The National Assembly shall consider such estimates and pass pursuant thereto such Appropriation Acts as are in its opinion necessary to meet the financial requirements of the State from time to time.

Article 127 The Auditor-General

- (1) There shall be an Auditor-General appointed by the President on the recommendation of the Public Service Commission and with the approval of the National Assembly. The Auditor-General shall hold office for five (5) years unless removed earlier under Sub-Article (4) hereof or unless he or she resigns. The Auditor-General shall be eligible for reappointment.
- (2) The Auditor-General shall audit the State Revenue Fund and shall perform all other functions assigned to him or her by the Government or by Act of Parliament and shall report annually to the National Assembly thereon.
- (3) The Auditor-General shall not be a member of the public service.
- (4) The Auditor-General shall not be removed from office unless a two-thirds majority of all the members of the National Assembly vote for such removal on the ground of mental incapacity or gross misconduct.

CHAPTER 17

Central Bank and National Planning Commission

Article 128 The Central Bank

- (1) There shall be established by Act of Parliament a Central Bank of the Republic of Namibia which shall serve as the State's principal instrument to control the money supply, the currency and the institutions of finance, and to perform all other functions ordinarily performed by a central bank.
- (2) The Governing Board of the Central Bank shall consist of a Governor, a Deputy-Governor and such other members of the Board as shall be prescribed by Act of Parliament, and all members of the Board shall be appointed by the President in accordance with procedures prescribed by such Act of Parliament.

Article 129 The National Planning Commission

- (1) There shall be established in the office of the President a National Planning Commission, whose task shall be to plan the priorities and direction of national development.
- (2) There shall be a Director-General of Planning appointed by the President in terms of Article 32(3)(i)(dd) hereof, who shall be the head of the National Planning Commission and the principal adviser to the President in regard to all matters pertaining to economic planning and who shall attend Cabinet meetings at the request of the President.
- (3) The membership, powers, functions and personnel of the National Planning Commission shall be regulated by Act of Parliament.

CHAPTER 18

Coming into Force of the Constitution

Article 130 Coming into Force of the Constitution

This Constitution as adopted by the Constituent Assembly shall come into force on the date of Independence.

CHAPTER 19

Amendment of the Constitution

Article 131 Entrenchment of Fundamental Rights and Freedoms

No repeal or amendment of any of the provisions of Chapter 3 hereof, in so far as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms contained and defined in that Chapter, shall be permissible under this Constitution, and no such purported repeal or amendment shall be valid or have any force or effect.

Article 132 Repeal and Amendment of the Constitution

- (1) Any bill seeking to repeal or amend any provision of this Constitution shall indicate the proposed repeals and/or amendments with reference to the specific Articles sought to be repealed and/or amended and shall not deal with any matter other than the proposed repeals or amendments.
- (2) The majorities required in Parliament for the repeal and/or amendment of any of the provisions of this Constitution shall be:
 - (a) two-thirds of all the members of the National Assembly; and
 - (b) two-thirds of all the members of the National Council.
- (3)
 - (a) Notwithstanding the provisions of Sub-Article (2) hereof, if a bill proposing a repeal and/or amendment of any of the provisions of this Constitution secures a majority of two-thirds of all the members of the National Assembly, but fails to secure a majority of two-thirds of all the members of the National Council, the President may by Proclamation make the bill containing the proposed repeals and/or amendments the subject of a national referendum.
 - (b) The national referendum referred to in Sub-Article (a) hereof shall be conducted in accordance with procedures prescribed for the holding of referenda by Act of Parliament.
 - (c) If upon the holding of such a referendum the bill containing the

- proposed repeals and/or amendments is approved by a two-thirds majority of all the votes cast in the referendum, the bill shall be deemed to have been passed in accordance with the provisions of this Constitution, and the President shall deal with it in terms of Article 56 hereof.
- (4) No repeal or amendment of this Sub-Article or Sub-Articles (2) or (3) hereof in so far as it seeks to diminish or detract from the majorities required in Parliament or in a referendum shall be permissible under this Constitution, and no such purported repeal or amendment shall be valid or have any force or effect.
- (5) Nothing contained in this Article:
- (a) shall detract in any way from the entrenchment provided for in Article 131 hereof of the fundamental rights and freedoms contained and defined in Chapter 3 hereof;
- (b) shall prevent Parliament from changing its own composition or structures by amending or repealing any of the provisions of this Constitution: provided always that such repeals or amendments are effected in accordance with the provisions of this Constitution.

CHAPTER 20

The Law in Force and Transitional Provisions

Article 133 The First National Assembly

Notwithstanding the provisions of Article 46 hereof, the Constituent Assembly shall be deemed to have been elected under Articles 46 and 49 hereof, and shall constitute the first National Assembly of Namibia, and its term of office and that of the President shall be deemed to have begun from the date of Independence.

Article 134 Election of the First President

- (1) Notwithstanding the provisions of Article 28 hereof, the first President of Namibia shall be the person elected to that office by the Constituent Assembly by a simple majority of all its members.
- (2) The first President of Namibia shall be deemed to have been elected under Article 28 hereof and upon assuming office shall have all the powers, functions, duties and immunities of a President elected under that Article.

Article 135 Implementation of this Constitution

This Constitution shall be implemented in accordance with the provisions of Schedule 7 hereof.

Article 136 Powers of the National Assembly prior to the Election of a National Council

- (1) Until elections for a National Council have been held:
 - (a) all legislation shall be enacted by the National Assembly as if this Constitution had not made provision for a National Council, and Parliament had consisted exclusively of the National Assembly acting on its own without being subject to the review of the National Council;
 - (b) this Constitution shall be construed as if no functions had been vested by this Constitution in the National Council;
 - (c) any reference in Articles 29, 56, 75 and 132 hereof to the National Council shall be ignored: provided that nothing contained in this Sub-Article shall be construed as limiting in any way the generality of Sub-Articles (a) and (b) hereof.
- (2) Nothing contained in Sub-Article (1) hereof shall detract in any way from the provisions of Chapter 8 or any other provision of this Constitution in so far as they make provision for the establishment of a National Council, elections to the National Council and its functioning after such elections have been held.

Article 137 Elections of the First Regional Councils and the First National Council

- (1) The President shall by Proclamation establish the first Delimitation Commission which shall be constituted in accordance with the provisions of Article 104 (1) hereof, within six (6) months of the date of Independence.
- (2) Such Proclamation shall provide for those matters which are referred to in Articles 102 to 106 hereof, shall not be inconsistent with this Constitution and shall require the Delimitation Commission to determine boundaries of regions and Local Authorities for the purpose of holding Local Authority and Regional Council elections.
- (3) The Delimitation Commission appointed under such Proclamation shall forthwith commence its work, and shall report to the President within nine (9) months of its appointment: provided that the National Assembly may by resolution and for good cause extend the period within which such report shall be made.
- (4) Upon receipt of the report of the Delimitation Commission the President shall as soon as reasonably possible thereafter establish by Proclamation the boundaries of regions and Local Authorities in accordance with the terms of the report.
- (5) Elections for Local Authorities in terms of Article 111 hereof shall be held on a date to be fixed by the President by Proclamation, which shall be a date within six (6) months of the Proclamation referred to in Sub-Article (4) hereof, or within six (6) months of the date on which the legislation referred to in Article 111 hereof has been enacted, whichever is the later: provided that the National Assembly may by resolution and for good cause extend the period within which such elections shall be held.
- (6) Elections for Regional Councils shall be held on a date to be fixed by the President by Proclamation, which shall be a date within one (1) month of the date

of the elections referred to in Sub-Article (5) hereof, or within one (1) month of the date on which the legislation referred to in Article 106 (3) hereof has been enacted, whichever is the later: provided that the National Assembly may by resolution and for good cause extend the period within which such elections shall be held.

- (7) Elections for the first National Council shall be held on a date to be fixed by the President by Proclamation, which shall be a date within one (1) month of the date of the elections referred to in Sub-Article (6) hereof, or within one (1) month of the date on which the legislation referred to in Article 69(2) hereof has been enacted, whichever is the later: provided that the National Assembly may by resolution and for good cause extend the period within which such elections shall be held.

Article 138 Courts and Pending Actions

- (1) The Judge-President and other Judges of the Supreme Court of South-West Africa holding office at the date on which this Constitution is adopted by the Constituent Assembly shall be deemed to have been appointed as the Judge-President and Judges of the High Court of Namibia under Article 82 hereof on the date of Independence, and upon making the oath or affirmation of office in the terms set out in Schedule 1 hereof, shall become the first Judge-President and Judges of the High Court of Namibia: provided that if the Judge-President or any such Judges are sixty-five (65) years of age or older on such date, it shall be deemed that their appointments have been extended until the age of seventy (70) in terms of Article 82(4) hereof.

- (2) (a) The laws in force immediately prior to the date of Independence governing the jurisdiction of Courts within Namibia, the right of audience before such Courts, the manner in which procedure in such Courts shall be conducted and the power and authority of the Judges, Magistrates and other judicial officers, shall remain in force until repealed or amended by Act of Parliament, and all proceedings pending in such Courts at the date of Independence shall be continued as if such Courts had been duly constituted as Courts of the Republic of Namibia when the proceedings were instituted.

(b) Any appeal noted to the Appellate Division of the Supreme Court of South Africa against any judgment or order of the Supreme Court of South-West Africa shall be deemed to have been noted to the Supreme Court of Namibia and shall be prosecuted before such Court as if that judgment or order appealed against had been made by the High Court of Namibia and the appeal had been noted to the Supreme Court of Namibia.

(c) All criminal prosecutions initiated in Courts within Namibia prior to the date of Independence shall be continued as if such prosecutions had been initiated after the date of Independence in Courts of the Republic of Namibia.

(d) All crimes committed in Namibia prior to the date of Independence which would be crimes according to the law of the Republic of Namibia if it had then existed, shall be deemed to constitute crimes according to the law of the Republic of Namibia, and to be punishable as such in and by the Courts of the Republic of Namibia.

- (3) Pending the enactment of the legislation contemplated by Article 79 hereof:
- (a) the Supreme Court shall have the same jurisdiction to hear and determine appeals from Courts in Namibia as was previously vested in the Appellate Division of the Supreme Court of South Africa;
 - (b) the Supreme Court shall have jurisdiction to hear and determine matters referred to it for a decision by the Attorney-General under this Constitution;
 - (c) all persons having the right of audience before the High Court shall have the right of audience before the Supreme Court;
 - (d) three (3) Judges shall constitute a quorum of the Supreme Court when it hears appeals or deals with matters under Sub-Articles (a) and (b) hereof: provided that if any such Judge dies or becomes unable to act after the hearing of the appeal or such matter has commenced, but prior to judgment, the law applicable in such circumstances to the death or inability of a Judge of the High Court shall apply *mutatis mutandis*;
 - (e) until rules of the Supreme Court are made by the Chief Justice for the noting and prosecution of appeals and all matters incidental thereto, the rules which regulated appeals from the Supreme Court of South-West Africa to the Appellate Division of the Supreme Court of South Africa, and were in force immediately prior to the date of Independence, shall apply *mutatis mutandis*.

Article 139 The Judicial Service Commission

- (1) Pending the enactment of legislation as contemplated by Article 85 hereof and the appointment of a Judicial Service Commission thereunder, the Judicial Service Commission shall be appointed by the President by Proclamation and shall consist of the Chief Justice, a Judge appointed by the President, the Attorney-General, an advocate nominated by the Bar Council of Namibia and an attorney nominated by the Council of the Law Society of South-West Africa: provided that until the first Chief Justice has been appointed, the President shall appoint a second Judge to be a member of the Judicial Service Commission who shall hold office thereon until the Chief Justice has been appointed. The Judicial Service Commission shall elect from amongst its members at its first meeting the person to preside at its meetings until the Chief Justice has been appointed. The first task of the Judicial Service Commission shall be to make a recommendation to the President with regard to the appointment of the first Chief Justice.
- (2) Save as aforesaid the provisions of Article 85 hereof shall apply to the functioning of the Judicial Service Commission appointed under Sub-Article (1) hereof, which shall have all the powers vested in the Judicial Service Commission by this Constitution.

Article 140 The Law in Force at the Date of Independence

- (1) Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a

- competent Court.
- (2) Any powers vested by such laws in the Government, or in a Minister or other official of the Republic of South Africa shall be deemed to vest in the Government of the Republic of Namibia or in a corresponding Minister or official of the Government of the Republic of Namibia, and all powers, duties and functions which so vested in the Government Service Commission, shall vest in the Public Service Commission referred to in Article 112 hereof.
 - (3) Anything done under such laws prior to the date of Independence by the Government, or by a Minister or other official of the Republic of South Africa shall be deemed to have been done by the Government of the Republic of Namibia or by a corresponding Minister or official of the Government of the Republic of Namibia, unless such action is subsequently repudiated by an Act of Parliament, and anything so done by the Government Service Commission shall be deemed to have been done by the Public Service Commission referred to in Article 112 hereof, unless it is determined otherwise by an Act of Parliament.
 - (4) Any reference in such laws to the President, the Government, a Minister or other official or institution in the Republic of South Africa shall be deemed to be a reference to the President of Namibia or to a corresponding Minister, official or institution in the Republic of Namibia and any reference to the Government Service Commission or the government service, shall be construed as a reference to the Public Service Commission referred to in Article 112 hereof or the public service of Namibia.
 - (5) For the purposes of this Article the Government of the Republic of South Africa shall be deemed to include the Administration of the Administrator-General appointed by the Government of South Africa to administer Namibia, and any reference to the Administrator-General in legislation enacted by such Administration shall be deemed to be a reference to the President of Namibia, and any reference to a Minister or official of such Administration shall be deemed to be a reference to a corresponding Minister or official of the Government of the Republic of Namibia.

Article 141 Existing Appointments

- (1) Subject to the provisions of this Constitution, any person holding office under any law in force on the date of Independence shall continue to hold such office unless and until he or she resigns or is retired, transferred or removed from office in accordance with law.
- (2) Any reference to the Attorney-General in legislation in force immediately prior to the date of Independence shall be deemed to be a reference to the Prosecutor-General, who shall exercise his or her functions in accordance with this Constitution.

Article 142 Appointment of the First Chief of the Defence Force, the First Inspector-General of Police and the First Commissioner of Prisons

The President shall, in consultation with the leaders of all political parties represented in the National Assembly, appoint by Proclamation the first Chief of the Defence Force, the first

Inspector-General of Police and the first Commissioner of Prisons.

Article 143 Existing International Agreements

All existing international agreements binding upon Namibia shall remain in force, unless and until the National Assembly acting under Article 63(2)(d) hereof otherwise decides.

CHAPTER 21

Final Provisions

Article 144 International Law

Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

Article 145 Saving

- (1) Nothing contained in this Constitution shall be construed as imposing upon the Government of Namibia:
 - (a) any obligations to any other State which would not otherwise have existed under international law;
 - (b) any obligations to any person arising out of the acts or contracts of prior Administrations which would not otherwise have been recognised by international law as binding upon the Republic of Namibia.
- (2) Nothing contained in this Constitution shall be construed as recognising in any way the validity of the Administration of Namibia by the Government of the Republic of South Africa or by the Administrator-General appointed by the Government of the Republic of South Africa to administer Namibia.

Article 146 Definitions

- (1) Unless the context otherwise indicates, any word or expression in this Constitution shall bear the meaning given to such word or expression in any law which deals with the interpretation of statutes and which was in operation within the territory of Namibia prior to the date of Independence.
- (2) (a) The word "Parliament" shall mean the National Assembly and, once the first National Council has been elected, shall mean the National Assembly acting, when so required by this Constitution, subject to the review of the National Council.

- (b) Any reference to the plural shall include the singular and any reference to the singular shall include the plural.
- (c) Any reference to the "date of Independence" or "Independence" shall be deemed to be a reference to the day as of which Namibia is declared to be independent by the Constituent Assembly.
- (d) Any reference to the "Constituent Assembly" shall be deemed to be a reference to the Constituent Assembly elected for Namibia during November 1989 as contemplated by United Nations Security Council Resolution 435 of 1978.
- (e) Any reference to "Gazette" shall be deemed to be a reference to the Government Gazette of the Republic of Namibia.

Article 147 Repeal of Laws

The laws set out in Schedule 8 hereof are hereby repealed.

Article 148 Short Title

This Constitution shall be called the Namibian Constitution.

University of Cape Town

SCHEDULE 1

Oath / Affirmation Of Judges

"I,..... do hereby swear/solemnly affirm that as a Judge of the Republic of Namibia I will defend and uphold the Constitution of the Republic of Namibia as the Supreme Law and will fearlessly administer justice to all persons without favour or prejudice and in accordance with the laws of the Republic of Namibia.

(in the case of an oath)
So help m e God."

SCHEDULE 2

Oath / Affirmation of Ministers and Deputy-Ministers

"I,..... do hereby swear/solemnly affirm that I will be faithful to the Republic of Namibia, hold m y office as Minister/Deputy-Minister with honour and dignity, uphold, protect and defend the Constitution and faithfully obey, execute and administer the laws of the Republic of Namibia, serve the people of Namibia to the best of my ability, not divulge directly or indirectly any matters brought before the Cabinet and entrusted to me under secrecy, and perform the duties of my office and the functions entrusted to m e by the President conscientiously and to the best of my ability.

(in the case of an oath)
So help m e God."

SCHEDULE 3

Oath / Affirmation of Members of the National Assembly and the National Council

"I,..... do hereby swear/solemnly affirm that I will be faithful to the Republic of Namibia and its people and I solemnly promise to uphold and defend the Constitution and laws of the Republic of Namibia to the best of my ability.

(in the case of an oath)
So help m e God."

SCHEDULE 4

Election of Members of the National Assembly

- (1) For the purpose of filling the seventy-two (72) seats in the National Assembly pursuant to the provisions of Article 46 (1)(a) hereof, the total number of votes cast in a general election for these seats shall be divided by seventy-two (72) and the result shall constitute the quota of votes per seat.
- (2) The total number of votes cast in favour of a registered political party which offers itself for this purpose shall be divided by the quota of votes per seat and the result shall, subject to paragraph (3), constitute the number of seats to which that political party shall be entitled in the National Assembly.
- (3) Where the formula set out in paragraph (2) yields a surplus fraction not absorbed by the number of seats allocated to the political party concerned, such surplus shall compete with other similar surpluses accruing to any other political party or parties participating in the election, and any undistributed seat or seats (in terms of the formula set out in paragraph (2)) shall be awarded to the party or parties concerned in sequence of the highest surplus.
- (4) Subject to the requirements pertaining to the qualification of members of the National Assembly, a political party which qualifies for seats in terms of paragraphs (2) and (3) shall be free to choose in its own discretion which persons to nominate as members of the National Assembly to fill the said seats.
- (5) Provision shall be made by Act of Parliament for all parties participating in an election of members of the National Assembly to be represented at all material stages of the election process and to be afforded a reasonable opportunity for scrutinising the counting of the votes cast in such election.

SCHEDULE 5

Property vesting in The Government of Namibia

- (1) All property of which the ownership or control immediately prior to the date of Independence vested in the Government of the Territory of South West Africa, or in any Representative Authority constituted in terms of the Representative Authorities Proclamation, 1980 (Proclamation AG 8 of 1980), or in the Government of Rehoboth, or in any other body, statutory or otherwise, constituted by or for the benefit of any such Government or Authority immediately prior to the date of Independence, or which was held in trust for or on behalf of the Government of an independent Namibia, shall vest in or be under the control of the Government of Namibia.
- (2) For the purpose of this Schedule, "property" shall, without detracting from the generality of that term as generally accepted and understood, mean and include movable and immovable property, whether corporeal or incorporeal and wheresoever situate, and shall include any right or interest therein.
- (3) All such immovable property shall be transferred to the Government of Namibia without payment of transfer duty, stamp duty or any other fee or charge, but subject to any existing right, charge, obligation or trust on or over such property and subject also to the provisions of this Constitution.
- (4) The Registrar of Deeds concerned shall upon production to him or her of the title deed to any immovable property mentioned in paragraph (1) endorse such title deed to the effect that the immovable property therein described is vested in the Government of Namibia and shall make the necessary entries in his or her registers, and thereupon the said title deed shall serve and avail for all purposes as proof of the title of the Government of Namibia to the said property.

SCHEDULE 6

The National Flag of The Republic of Namibia

The National Flag of Namibia shall be rectangular in the proportion of three in the length to two in the width, tierced per bend reversed, blue, white and green; the white bend reversed, which shall be one third of the width of the flag, is charged with another of red, one quarter of the width of the flag. In the upper hoist there shall be a gold sun with twelve straight rays, the diameter of which shall be one third of the width of the flag, with its vertical axis one fifth of the distance from the hoist, positioned equidistant from the top edge and from the reversed bend. The rays, which shall each be two fifths of the radius of the sun, issue from the outer edge of a blue ring, which shall be one tenth of the radius of the sun.

SCHEDULE 7

Implementation of this Constitution

1. On the day of Independence, the Secretary-General of the United Nations shall administer to the President, elected in terms of Article 134 hereof, the oath or affirmation prescribed by Article 30 hereof.
2. The President shall appoint the Prime Minister and administer to him or her the oath or affirmation set out in Schedule 2 hereof.
3. The President shall administer to the first Judges of Namibia, appointed under Article 138(1) hereof, the oath or affirmation set out in Schedule 1 hereof.
4. On the day determined by the Constituent Assembly the National Assembly shall first meet, at a time and at a place specified by the Prime Minister.
5. The members of the National Assembly, with the Prime Minister as Chairperson, shall:
 - (a) take the oath or affirmation prescribed by Article 55 hereof before the Judge-President or a Judge designated by the Judge President for this purpose;
 - (b) elect the Speaker of the National Assembly.
6. The National Assembly, with the Speaker as Chairperson, shall:
 - (a) elect a Deputy-Speaker;
 - (b) conduct such business as it deems appropriate;
 - (c) adjourn to a date to be determined by the National Assembly.
7. The rules and procedures followed by the Constituent Assembly for the holding of its meetings shall, *mutatis m utandis*, be the rules and procedures to be followed by the National Assembly until such time as the National Assembly has adopted rules of procedure and standing orders under Article 59 hereof.

SCHEDULE 8

Repeal Of Laws

South-West Africa Constitution Act, 1968 (Act No. 39 of 1968)

Rehoboth Self-Government Act, 1978 (Act No. 56 of 1976)

Establishment of Office of Administrator-General for the Territory of South West Africa Proclamation, 1977 (Proclamation N o. 180 of 1977 of the State President)

Empowering of the Administrator-General for the Territory of South-West Africa to make Laws Proclamation, 1977 (Proclamation No. 181 of 1977 of the State President)

Representative Authorities Proclamation, 1980 (Proclamation AG. 8 of 1980)

Representative Authority of the Whites Proclamation, 1980 (Proclamation AG. 12 of 1980)

Representative Authority of the Coloureds Proclamation, 1980 (Proclamation AG. 14 of 1980)

Representative Authority of the Ovambos Proclamation, 1980 (Proclamation AG. 23 of 1980)

Representative Authority of the Kavangos Proclamation, 1980 (Proclamation AG. 26 of 1980)

Representative Authority of the Caprivians Proclamation, 1980 (Proclamation AG. 29 of 1980)

Representative Authority of the Damaras Proclamation, 1980 (Proclamation AG. 32 of 1980)

Representative Authority of the Namas Proclamation, 1980 (Proclamation AG. 35 of 1980)

Representative Authority of the Tswanas Proclamation, 1980 (Proclamation AG. 47 of 1980)

Representative Authority of the Hereros Proclamation, 1980 (Proclamation AG. 50 of 1980)

Representative Authority Powers Transfer Proclamation, 1989 (Proclamation AG. 8 of 1989)

Government of Rehoboth Powers Transfers Proclamation, 1989 (Proclamation AG. 32 of 1989)

EXPLANATORY NOTE:

_____ Words underlined with a solid line indicates insertions in existing provisions.
[_____] Words in bold type in square brackets indicate omissions from existing provisions.

ACT

To amend the Namibian Constitution so as to provide that the first President of Namibia may hold office as President for three terms, and to provide for incidental matters.

(Signed by the President on 7 December 1998)

BE IT ENACTED by the Parliament of the Republic of Namibia, in accordance with the requirements of Article 132 of the Namibian Constitution, as follows:-

Amendment of Article 134 of the Namibian Constitution

1. Article 134 of the Namibian Constitution is amended by the addition of the following Sub-Article:
“(3) Notwithstanding Article 29(3), the first President of Namibia may hold office as President for three terms”

Short title

2. This Act shall be called the Namibian Constitution First Amendment Act, 1998.
-

APPENDIX D

HANSARD OF THE STANDING COMMITTEE ON STANDING RULES AND ORDERS AND INTERNAL ARRANGEMENTS

WINDHOEK
8 DECEMBER 1989

CHAIRMAN: When we adjourned yesterday we decided to go and work throughout the night to try to identify, I hope not only areas of disagreement, but first the area of agreement, so that we can see how close we are and then to point out areas to be discussed by the Namibian leaders and to iron out those differences and then to make a report to the full assembly on Tuesday. I am in the hands of the committee, but would like to propose that parties, or those who have done the job, who feel they can contribute, will start the ball rolling by somebody who thinks he did the most work.

MR MUDGE: Mr Chairman, I take the floor not because I want to dominate the meeting, please don't get me wrong, but I have done some homework with my colleagues. We did spend many hours together, and we have – and I am not apologizing for that – taken your proposal as the basis for our discussion, not because I think it is the best proposal, of course, but because it represents....

CHAIRMAN: Of course, you are not meaning me...

MR KATJIUONGUA: The chairman is neutral, SWAPO-proposal.

MR MUDGE: Because it represents the views of the majority and we have to take that into account. Mr Staby, Mr Barnes, Mr Matjila and spent many hours together and we have gone through your proposal first of all, page by page and article by article. We have come to the conclusion that as far as the preamble is concerned, the first chapter and even part 2, the bill of fundamental rights, although we have identified certain basic differences – and I will ask Mr Staby to very shortly point out not the sentence by sentence and paragraph by paragraph, but I think a few fundamental things, mainly regarding certain constraints. We came to the conclusion that if we would refer the bill of fundamental rights and the preamble to a committee of specialists, of legal people, we are sure that it would be possible for us to reach agreement on those issues. I think instead of spending hours and hours discussing them. I do not want to propose that parties should not be allowed to express opinions on basic fundamental differences; I think that should be allowed, if you agree with that, but I don't think there will be many problems there. I will ask Mr Staby just to point out a few of the differences and I am sure some of the other parties will want to do the same. I would ask us not to spend too much time talking about that. I think most of these differences could be sorted out by the co-opted legal advisors legal advisors.

When it comes to the president, think we have a problem there. I think that will have to be discussed. It is now already identified as one of the fundamental differences between at least our party and SWAPO's proposal. The same applies to the legislature where we propose a bicameral system, and the election procedure, where we propose proportional representation. We have also come to the conclusion that we have another practical problem, namely that if we want to transform the present assembly into a government, whatever we decide as far as a bicameral system is concerned, the regional councils and proportional representation, the question will then definitely come up: when, at what stage, because there are no elected regional councils at this stage and we don't have elected senators at this stage. How are we going to implement that? So, that will have to be discussed. When it comes to the council of ministers, of course this is closely linked to the opposition of the president and I think that will then have to be discussed. When it comes to regional councils, I must say I don't find very serious differences between the SWAPO-proposal and our proposal. Maybe I am not interpreting their proposal correctly, but I get the impression that even there.... But there Mr Katjiuongua indicated that he has a problem with the regional councils.

With this introduction, if you would now just allow my colleague, Mr Staby, to very briefly point out, and it depends how you want to organize the meeting, whether you want us to discuss not article by article, but at least chapter by chapter. Then I would ask Mr Staby just to very briefly point out the problems that we have with SWAPO's proposal regarding fundamental rights. I think

we have only two problems in part 1, chapter 1 and 2. In Chapter 1 I think we will have to discuss the territory of Namibia. What do we mean when we talk about the territory of Namibia? I am now referring to article 1 (4) of SWAPO's proposal.

CHAIRMAN: Could I just ask the other members, you are proposing that we use the SWAPO-document. You used the SWAPO-document as a basis. Are we agreed that we will use that one as we go chapter by chapter?

MR RUKORO: I have slightly different approach, namely that we start by trying to identify, and having identified, to formulate areas of material dispute, as we said yesterday, list them one by one. Which are the areas where we think there is bound to be some serious discussion? Just list them without discussing them. Then we have an idea of the task facing us, and having done that, secondly we also have terms of reference; we identify and formulate the working categories based on for instance this. That would be more or less what Mr Mudge was trying to do. For instance, you say next Tuesday when we start, we will start with chapter 1, all the provisions related to establishment or what in some other documents are referred to as general provisions. On that basis we work out a whole work schedule, even for a whole week, starting next week Tuesday. Then we get some kind of programme, rather than going into discussions now on the basis of a single document and not on the basis of categories.

MR MUDGE: I don't want to be misunderstood, may I just make it clear. I am not accepting SWAPO's proposal. What I do say and what I said, I had to find out what SWAPO disagrees with us, so I had to look at their constitution and disagree with just for the purpose of identifying those differences let us look SWAPO's constitution, then we will find the areas of dispute.

MR PRETORIUS: I just want to say I am also prepared to accept SWAPO's constitution as a basis for our discussion.

MR AMATHILA: I want to support what I understood to be a proposal, that we use the SWAPO-document as a basis for our discussion. I would also like to support the honourable Mr Rukoro's approach that parties actually have the chance to introduce their ideas and having done that, at least the basis for our discussion should be the document of SWAPO.

MR TJITENDERO: We accept it was a working document.

MR KATJIUONUA: I support the proposition by Mr Rukoro as a point of departure. I think we must stick to our terms of reference to begin with. I think only after we have identified appropriate working categories and so on, then we can decide what document we shall use as point of departure, and we have to come to that yet now. So, I think we must be more systematic, otherwise we will get into confusion and we will not make progress. So, I think first of all we should follow our instructions here, as we agreed upon yesterday, and then we say these are the points of differences, and then we categories areas of work and then we can take one of the documents. Otherwise there will be confusion.

CHAIRMAN: We have decided not to debate on a small minor thing. The point is we adjourned the meeting to go and identify areas of differences. If we agree by categories, that you should talk about preamble, you point out the differences in the preamble. If you found them how they differ. But let's first, as we have agreed, identify differences. That is a systematic way, differences, but not a debate, please. First just to identify them. Basically we pointed out three areas, main ones: presidency, legislature and voting system. That some of us saw as main differences. If we want to add more, those who want to add, can take the floor to add additional ones.

MR TJITENDERO: Thank you. I was very much impressed by the approach that Mr Mudge took. I think it was beginning to show progress in that direction. The differences that were state in all the statements, is where there is a material dispute or fundamental differences in the submissions, If we go by bringing in all the tangents, then obviously we will subject this session again to the same discussions we had Before. I think Mr Mudge made a very progressive move by saying let's first adopt. In any conference you come to you have a working document. You look for its shortcomings and its omissions, and then you try to fill that. So, I feel that we have the material in front of us here, which are all related to one thing, the constitution, and I assume and I thought the reasons why Mr Mudge had suggestion The adoption of a working document, was taking into account how conventionally it covers the areas that are covered by the constitutions, and on that basis we take – establishment and all the areas that have been made, we discuss in relation to establishment what is missing or what needs to be strengthened. When we agree, then we submit that to the experts. With every article in it, so I now want to discuss the one with which I

differ most and that is why I want SWAPO's constitution to be the basis of the discussions. I am just making a joke, Sir. In any case, let us start with the chapters, with the bill of fundamental Rights, and then can discuss it briefly, point out differences, refer it to the specialists and they can compare it and see if they can come with a combined thing. Then we go on chapter by chapter and identify areas of material dispute.

CHAIRMAN: The committee seems to be divided. There is a proposal that we go chapter by chapter, but you seem not be accepting the SWAPO-paper as a basis to discuss chapter by chapter.

MR KATJIUONGUA: Discussing chapter by chapter, does it mean to identify differences or to do what?

CHAIRMAN: Yes. For instance, if in the preamble there are differences or omissions, we say preamble is omitting this area which is mentioned in other documents. There was a proposal.

MEMBER: I want to second the proposal.

CHAIRMAN: We take the preamble first.

MR STABY: Concerning the preamble, I think it is necessary that the various proposals be reconciled as have been said in connection with the various other aspects of proposals yesterday and intimated this morning. So, one would have to look carefully at the various proposals that have been tabled. I just want to do so, bearing in mind certain principles, and unfortunately a preamble isn't a preamble in terms of a bill of rights, I think the attitude is fairly diverging. In essence I think the preamble should be fairly easily reconcilable, because they say the same thing in different word. First of all our attitude would be that the preamble must be oriented at the future and not deal with the past. I think that is the first pre-requisite. The second one is that we think the preamble must cover essentials only, and not embark on emotional things, for which we obviously have understanding. There is for instance in the proposal under discussion, in the fifth paragraph a reference to "apartheid, racism and colonialism." We have understanding for that; there can be no argument about that. But I would just like to point out, particularly in view of the fact that further on in the document one has various prohibitions against the practice of apartheid and racism, with which we agree in essence, but we want to draw attention to the fact that there are other practices which are equally repugnant. If one takes fascism for instance. If we mention one expressly, the question arises whether we do not condone the others. So, one would have to look at these formulations in that light. I think that is basically what we are saying with regard to, for instance, a positive approach oriented at the future. I can just draw attention to the fourth paragraph where it says: "whereas these rights for the people of Namibia have so long been denied by apartheid, racism and colonialism..." It is one way of formulating it. The other one would be: "Whereas the people of Namibia have finally achieved freedom", would be a positive way of formulating that. I just want to explain our approach to that. Mr. Chairman, I unfortunately have to leave this meeting at 10 o'clock, so if I may be given the opportunity to look at the Bill of rights or to express some views on that before I leave, I would be most grateful.

CHAIRMAN: We must go chapter by chapter. There is a comment on preamble. Any differences in preamble?

MR PRETORIOUS: I don't want to point out any differences, but think in general I want to agree with Mr Staby that we must try to look in the future and not the past.

MR RUPPEL: I think there should be at least a short reference to the context of this constitution, and then we will have to refer to the past and so on. We are not born in a vacuum, we are born as a nation and the background cannot just be disregarded completely. But I think there is a possibility of marrying the two differences.

MR MUDGE: Let me make our view very clear. A constitution is not written for one generation, it is written for generations to come, and let me repeat that we have understanding. When anybody refers to apartheid and discrimination and colonialism I really appreciate your strong feelings about it, but in two or three generations from now, I hope the people will not even know the word "apartheid" anymore I hope it will not be part of the vocabulary anymore. Do we want to write things in to our constitution which in two or three generations will be understood. I don't have the answer; we have only identified differences of approach. It is probably not the responsibility of the committee at this point in time to now start arguing about it. Let us just identify it as an area of dispute which we think should be discussed.

MR GURIRAB: I think we will get around the concerns, but it would be injustice done to the future generations of Namibia if we were to, in a constitution which we are now charged to write, deny them their history, both the good of it and its negatives. All the good constitutions recall history, the circumstances under which they have been brought in to being, and on that basis they project a better future. I do not expect that we should be arguing in the preamble, but we cannot deny the past. So, it is a question of language, it is a question of drafting.

MR KATJIUONGUA: Mr Chairman, myself and my colleague here, Mr Rukoro, did the following. First we identified what we regard as important areas of dispute or differences. Then we also identified areas in which clarity is needed as important areas in which this assembly has to provide clarity, not necessarily fundamental areas of difference, but through the discussion we noticed that have different ones with different emphasis and therefore clarity was required. So, first of all the areas of material disputes or differences are the presidency, the parliament, electoral system, regional or local government and amendments to the constitution. Those five points we see as points as serious differences between the parties here, and the army and police as well. Protection of fundamental rights, some people say emergencies can be used to suspend those rights, but maybe that is more a clarity than a dispute. Then we have the question of the army and police. Some people say there is no need to have an army, but Para-military force, including police. Myself.... Feel strongly that we must have a force of some sort. I think those are fundamental areas of differences. Then there are areas on which clarity is needed. The nature of the state. Colleagues in the FNC say federal, and then a unitary state can also be terribly concentrated, it can be decentralized or not in lieu of federalism. That is another way. Then the issue of succession. We have all these debts which South Africa was talking about when he was here. Are we going to take those debts and other responsibilities or are we going to deny them? I think we cannot run away from that. Then we have the question of land reform. We haven't said much about that, but I understand – and I am sorry to mention race and colour – a lot of the black politicians in this campaign have been talking a lot about the question of land, and somehow it is a controversial issue we know very well, sometimes when you talk about historical lands. I was talking to my colleague here and I said: "When say to heroes the land goes back to the people, it means that Okahandja and the farm of Mr Mudge and some places must go back to the people without paying. Is this what we mean by land reform or not?" Things like that need clarity. The question of languages, we are not quite clear about that. Then, the question of environment: We mentioned the other day that there are people walking around here with money, bags of money, who think that they can give all this waste and we can get money to balance our budget and to have a nice time. Then the death penalty: I think that is a serious question. We know in England and many other countries, whether people who kill should be killed or not. I think our friends from the NNF have a different approach. The last thing, and I think and I think the point that Mr Mudge also referred to earlier, is the question of where do we go from here, what is the future, election, a government, what do we do? After we have written a constitution we must take action and what is that action going to be? From our side we thought may be these are the points on which we are going to take document, and I have no problem to take the SWAPO-constitution as a point of departure, on the understanding that when it comes to these provisions, I have a chance to bring in my ideas.

CHAIRMAN: After I gave the honourable member the floor to satisfy myself, I am now convinced my original decision was the correct one, because all those things are mentioned in the document. When we come to them, you will then intervene and say "here I have difference." I am satisfied that I gave you the floor, but I am convinced the first decision was the correct one. When we come to those aspects you can point it out.

MR MUDGE: I just want to ask, let us get absolute clarity on the question of the territory of Namibia. I am not hundred percent sure, for instance the DTA – and I am sure Mr Katjiuongua mentioned it the other day – is also concerned about the southern border. We feel it must be the middle of the Orange River and I think we must get absolute clarity among ourselves on the issue of Walvis Bay and the islands on the coast. I don't think we should bump our heads against a legal situation; we must take that in to consideration. All of us agree we want Walvis Bay, but we also have to consider the possibility of negotiations about certain areas. Can we just identify that as a point that will have to be properly investigated? I don't to argue about it at this stage.

CHAIRMAN: The constitution is for the future. Are we going to investigate this matter in the constitution?

MR MUDGE: No before we draft the constitution, we must make sure that we all agree on the description of the territory, because I don't know when you say, which is accepted by the express consensus of the international community" what does that mean? I don't know exactly. We want to have a specific description of the territory of Namibia.

MR GURIRAB: Yes, I think we will need to do that. The formulation in NNF's version being more explicit than this formulation. But in the constitution. Whatever the future arrangement are going to be between Independent Namibian and South Africa, as Namibians we should define the territory of Namibia as being inclusive of Walvis Bay and the island and the southern border being the middle of the river resolution of the outstanding dispute, we will find ways to handle that, whether by negotiations or internationally in court.

MR KATJUONGUA: I agree with my two colleagues that a constitution is a long-time document. So, I don't care so much about expressed will by the international community, but think as we ourselves understand it to be what is Namibia, I think we must try to put in the constitution everything that we think is Namibia. Maybe the only colleagues who have a point of difference here are the FCN who in their proposal say South West Africa as it exists today. That might exclude Walvis Bay and some other places. Maybe they can tell us what the problem is.

MR MUDGE: Can we have a look at the DTA-proposal should be amended a little, when you say in article 6:

"The Territory of the country shall be the territory known as South West Africa at the enactment of this constitution, and including additional territory as may be agreed upon."

We can change that a little, as is incorporated or whatever we might want to say there. But then we know exactly what we are talking about and then we can even mention Walvis Bay and we can mention the islands. I don't have a problem there, but let us be a little more specific, then we know what we are talking about.

DR TJITENDERO: I think we should look at the specific, definition of the territory in the NNF-proposal. I think that defiantly will take care of the concerns.

MR PRETORIUS: Of the question of languages, I am identifying it.

MR MUDGE: May I comment on this paragraph on language? I must say it is very reasonable. I think I should say that. As far as I am concerned it is very much appreciated what you have proposed. I have a problem with the role of Afrikaans.

MR RUPPEL: I have a problem with the kind of thing which Mr Pretorius placed on record. If the honourable member wants to say that this is a matter which should be dealt with another committee, then that must be clearly stated. It is a political decision. We cannot just say there is a difference and then just leave it like that. We must decide what we are going to do with this difference. Is it a difference which will be referred, or is it difference where we will just use our combined vote against you? That sort of thing. We have to be practical and we don't want to be going on matters in committees where it is quite clear that only a very, very minute minority, although they may be washed away in any event by the consensus in this committee. So, we must be practical, otherwise we will find all sorts of small differences which really don't matter and they will all be subject to lengthy discussions in committees and committees. So, I think here is a forum, here is a good cross-cut of our party representation and we can say this is a material one or not.

MR PRETORIKOS: I just want to say that I agree with Mr Mudge that we must now first identify, because if we want to debate every point, I don't think we will finish it. I was under the impression I must only identify.

CHAIRMAN: No, we agreed we will identify it by pointing out differences when we come to the issue. You can explain what your problem is.

MR RUPPEL: We have to, at the end of the day, not only to identify, but also give direction to the committees and if we now just go through the whole thing and identify and then go back and discuss it again, we have to give direction to the committees that is the second part of our mandate.

MR PRETORIUS: It is very important to me, for the sake of the feeling of our people and also the other language groups, that something is not done overnight. So, it is important to me that there is the exception of the fact that you have the right to talk your language even in public schools up to

a certain stage. You cannot do it overnight. It is against this background that I want to compare our proposals with those of SWAPO.

MR BARNES: The honourable member Mr Pretorius did express his views, but we are still lacking in a directive. Shouldn't we just say then if there are differences, refer it to a committee and then move on.

DR THIANGE: I am trying to understand the honourable member. His concerns are already covered. What he says is that he wants the groups to reserve the right to talk their languages in schools and that is exactly what is said. So it is covered. I do not understand his problem. Exactly what he said is provided for in 2.

MR PRETORIOUS: But even in governmental structures, what will is position? Say for example somebody is elected who can only speak Ovambo or Afrikaans, what will the position be?

DR THIANGE: Article 3.

MR PRITORIOUS: That is local government, not national government.

CHAIRMAN: It seems that Mr Pretorius thinks once independence comes, English will be spoken, Afrikaans stops. That is not what this means.

MR PRETORIOUS: Will that not be the effect of this?

CHAIRMAN: You will want to say other languages, not only Afrikaans? Part 2: "Nothing contained in this constitution shall prohibit the use of any other language as a media of instruction in both private schools as well as schools financed or subsidized by the state, subject to proper compliance to such requirements as might be imposed by law."

MR PRETORIOUS: That is just as far as schools are concerned.

CHAIRMAN: We are all proud of our languages. Are we going to say I should talk in the Assembly in Damara?

MR PRETORIOUS: That is what I feel that we might discuss, the practical situation.

MR MUDGE: Do I understand Mr Pretorius correctly; does he want to include in paragraph 3 the central government as well? Is that what he wants to?

MR PRETORIOUS: That is what I want to do.

MR MUDGE: Well, then say that.

CHAIRMAN: We just add "as well as central government."

DR Iyambo: I think it must be referred to a committee; it is changing the whole context there.

MR RUKORO: I have no big problems with five years as a compromise in exchange for a concession from Mudge on some other aspect. LAUGHTER.

MR MUDGE: I want to discuss the principle. The principal contained in paragraph 4, 5, 6 and 7. Just not to be misunderstood I said that we are in favour of affirmative action. I am sure you all know what I mean when I talk about affirmative action. We even, in one of our policy documents, use the words, "weider guttmachung." Translated into English means that you have to compensate somehow for damages done. In principle we have no problem, but I think the people in the country, the people that we need very much, when it comes to any form of affirmative action, you must make it very clear that it is going to be affirmative action and that it is not going to be discrimination in reverse. When I talk about this, I am not in any way differing from the principle. I am concerned about the wording, I am concerned about the formulation, because read by somebody who is not well informed and read by somebody who is suspicious, this might create serious problems. For instance, the fact that they say it can be changed after 25 years. If any government, responsible government decides after five or ten years that the injustices of the past have been eliminated, that the has been is approaches of affirmative action, that everybody is happy now, that the backlash has been recovered, then they will, but why 25 years? I was only hoping that when it comes to very sensitive issue like this, that we will be able to sit down and discuss it responsibly. You can have my word that we as party has a lot of understanding for the fact that some people, because of the laws of the past, lagged behind. For instance the fact that they could not own property, just to mention one we have not made a secret of it on public platforms and we believe in the principle. But when it comes to the inclusion of such a thing in the Bill of fundamental Rights, I think we must think very carefully when it comes to formulation I am just requesting the opportunity to at some stage discuss the formulation of these paragraphs.

MR PRETORIOUS: I am not a legal person, but 6(2); I know the German law is making provision for it by adding the words "no person may be wilfully or internationally discriminated against." It is very important, because for example for me not having a legal background, if you and Mr Mudge

ask me to fetch you a cup of tea, and one of flasks is already empty after I have poured your tea, and I pour out of the other flask for Mr Mudge and the one cup of tea is warm and the other is cold, that is discrimination, but it was not wilfully. So, it is very important for me and not for me because I will not be the government, and I never thought about it, but during the tea-pause Mr Mudge said he thought he would be the president. So, it is important to me that we say not being discriminated against. It is not so easy for the courts to make the difference. I think we must ask the specialists about this.

MR RUKORO: I think when it comes to this thing, discrimination is absolutely prohibited. The question of your state of mind is totally irrelevant, whether you intended it or not.

MR RUPPEL: I agree for once with honourable Mr Pretorius that there should be a slight qualifying clause. We discussed it when we had certain deliberations on our draft. Take for instance discrimination on the basis of sex. It is a practice in any democratic country I know that when it comes to providing facilities, that there is a difference made between women and men for ablution facilities or whatever. That is discriminating on the basis of sex, but it is perfectly acceptable in terms of the norms of the democratic state. A woman who wants to go to a man's toilet, and everything that goes with it, can go to a constitutional court in a future Namibia and enforce her right to do so, unless we qualify it, and there is a formulation to qualify it without taking the principle away at all, to just make it clear that in certain categories of accepted norms, one can deviate. There are many, I just thought of this sexual one, but certainly hospitals discriminate on that basis. They have women wards and men wards. I think if there is a very explicit provision to be made, it will not be frivolous. I think the example of the toilet may not be the most appropriate one. There are very democratic countries where women are not allowed to be co-signatories to their bank accounts or property and all that. I just wanted to give an example.

MR RUKORO: Maybe we can get out of that problem by re-drafting the whole thing so that it would read analogous to the universal Declaration where it says: "Every woman is entitled to all the rights and freedoms set forth in this declaration without distinction of any kind, such as race, colour, sex, language, religion, etc." I can see serious loopholes in this thing of lawfully or not lawfully, internationally or not internationally in a constitution.

MR MUDGE: I am afraid the word "discrimination" has got a specific connotation, something which is wrong and I cannot agree that you can qualify discrimination. As far as concerned, discrimination is discrimination. Unless you find a better word. I am not saying this only because of the connotation; I am also saying this because I know why Mr Pretorius wants those words in there. We have discussed it before. He maintains that if he has a school in which he wants to educate people in a specific culture and tradition and language and religion which, in the end, will boil down to racial discrimination, he will be able to defend it on the grounds that it is not discrimination, but in fact differentiation, or something like that. If we really want to have peace in this country, then we must avoid making provision for any form of discrimination. The way I understand discrimination doesn't mean that I say that from now on my wife will have to open the door for me when we get in to the car. I think we all realize that in some cases they will have to be special provision for women. There will be special provision for the handicapped. There will have to be special provision for many other categories of persons. But then we have to find another word. The minute you qualify discrimination then you look for trouble, and I speak from experience. I don't want to discuss the merits, all I want to say is that I will not support any proposal that paragraph. Not now. I think we can discuss the paragraph - that I am prepared to do.

MR PRETORIOUS: Mr Chairman, I don't want to get involved in political arguments, but it is important to me and I am now talking under correction, I think I once read in SWAPO-document, as far as private schools are concerned, that private schools may be instituted except on the basis of discrimination on the basis of colour, etc. So, there is some discrimination or making differences, and that is why I said not wilfully. It is accepted in western concepts and that is why I raised the point and it is not to justify only my point of view, but I think it may happen in future that this can create law consequences.

CHAIRMAN: We marry the two. The right to free trail is covered.

MR RUPPEL: Marry to DTA. Who would have thought that we would marry the DTA?

MR BARNES: Who would have thought we would take up such a marriage.

MR MUDGE: I have a problem with 14(2): "No person and no political party shall have the right to practice or to propagate the ideology of apartheid, which has for so long." I don't have a problem with that, but is that the only thing they will not be allowed to propagate?

CHAIRMAN: Fascism, tribalism.

MR PROTORIOUS: Will it be wise to mention certain and exclude the others?

CHAIRMAN: But apartheid is a specific ideology under which we suffered and tribalism. Those two are crimes. Let's get the others. If they are bad, we mention them.

MR PRETORIOUS: For example, communism.

CHAIRMAN: We don't know yet.

MR PRETORIOUS: According to Dr Crocker, the other day he said communism and apartheid is the same.

MR MUDGE:

Let me say again my views on discrimination and apartheid is known, but I am afraid if any future government would apartheid to go on, I will be very surprised. Frankly, I think it is a past era, it is over and out. But if we have a democratic society, then in a democratic society you must allow freedom of speech and we must not allow past experience, although I agree, we cannot forget the past, I don't expect you to forget the past, and you can even talk about the past, it is just normal, but throughout the document we find reference to, according to my feelings, too much about that. If anybody wants to propagate anything which is ridiculous, but which is not a threat to the security of the state, for God's sake, let them do that. What can we do about it? We will not go with them. There will be other people propagating other things which we will not like, and my problem is if we start specifying, where do we stop? Everything which is not included or specifically excluded will be included. In Other words, anybody who would stand up and say terrible things will say "yes, but in the Bill of rights you only refer to one thing, so the rest I am allowed to do." Isn't there another paragraph in this proposal where anything which might lead to disharmony could be stopped? Once you limit a political party, I think you have to be very specific. Then you have to say this and that will not be allowed, and there is a rule in common Law or in the Law that is not specifically excluded or the other way around....

MR KATJIOUNGUA: I have all the sympathy for that, but I think that in our context our country and our society has suffered from certain specific things which have been part of our problem. Fascism is one, apartheid is one and tribalism is one. I think this attempt has been done all over Africa. In all the constitutions of independent countries the question of tribalism has been done all over Africa. In all the constitutions of independent countries the question of tribalism has been addressed by all of them, simply because they want to create a nation and they want to free the people from tribalism. In our context apartheid is part of our context apartheid is part of our problem and fascism is part of apartheid. So therefore I feel that these things which are part of our history or problems, we cannot ignore them. Other things, we leave them out. If we need to make amendments in future to include them if they become problems, then we do so. But otherwise, you want to build a...

MR RUPPEL: In order to make this change, we must also change this one: "The practices of racial discrimination, or the practices and ideologies of apartheid, racism and tribalism." Then you make it clear that it is an ideology.

MR PRETORIUS: I don't want a marriage; I will be satisfied with a simple affair. Once again I please want to ask you whether we can't refer this to a committee and some specialist lawyers, because I don't think it is also in line with the international Covenant on civil and political Rights and also the International Covenant of religious Freedom. I think it is very important that this whole idea of group, and I am not prepare to plead here today, because I have not prepared myself, I thought we have only come here to appoint different committees. But take for example article 27 on the international Covenant on civil and Political Rights: "In those states in which ethnic, religious or linguistic minorities..." So, the concept of minorities is accepted. "Persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion or to use their own language". Here the whole emphasis is on an individual and only his personal life and not in community with others. So I am very worried about it.

MR RUKORO: I was just going to ask one or two questions to Mr Pretorius. Assuming we accept this rights as you for see them, would they for instance allow us to have a situation where we are

going to have white-only schools as an exercise of the right to cultural minority, or to have a white-only hospital?

MR PRETORIUS: No, that is not the idea. I thought very hard in the past on the principle of free association, because race and colour can't be excluded when we talk about free association. But it was not included in this particular section. Race and colour, as far as I am concerned you are correct, except it is not included in such an article. I will not use this article to justify it.

MR MUDGE: Let me start off by saying that when you talk about discrimination in Namibia, it has a different connotation when you talk about discrimination in another country, say for instance Japan. When you talk about group rights here, when we discuss the protection for minority rights and group rights in this country, we must do so against the background of our own experience. Let me say that not only the black people had bad experiences with group rights, as a white man I had bad experiences with this concept of group rights, and for that reason I am not opposed to discussing it. We can discuss it, but I will never agree with it. I personally feel that if you protect the individual, you are also protecting the individual in association with other people. Then you have to deal with groups that are voluntarily formed, but when you start defining groups, the way it is done in ACN's proposal, then they put me before the choice either to be a member of the group or not to be a member of anything at all, and then I am in trouble. But I don't want to go into detail. I have one problem with the sentence here.

MR PRETORIUS: I want to raise a point of order. I have already informed you about it. I read in the "Times" this morning of which persons the committee was comprised and then the following: "All the committee members, with the exception of Mr Pretorius, expressed their unequivocal opposition to the move. Mr Pretorius, however when the committee met in the Tintenpalast, told his fellow committee member that he was only going along to gather information and not to question the merits of the issue. Mr Pretorius repeated this when they met Mr Pienaar in South West house. At the conclusion of the meeting with the AG, Mr Pretorius was requested to remain behind, according to reliable sources." Mr Chairman, that is not true. All the members present know that this was not true, that is half of the truth and it was told by somebody, and what upsets is the fact that we are talking about reconciliation. Then we must accept each other's integrity. I want to put it on record that what I actually said here to the committee was that they must get used to it, those who don't, know me, that I am very Straight forward about the whole question. So, I asked Dr Tjitendero whether we are talking about the strategy or the merits and it was decided only the strategy. I told the committee that I was not involved in this whole question, but I know about it by questioning that is going on and my sympathy is with my people, but I never said what is in here. So I am very upset about it and I just wanted to put it on record, and I was not called back by the administrator General. I was called back by his secretary who wanted me to sign an envelope of the election. It is true that the administrator General then spoke a few words to me, but it was not he who called me back. So, either the committee trusts the members of the committee or in future I will....

MR MUDGE: May I realize a point of order? If Mr Pretorius or the chairman wants to discuss the newspaper report, I think we don't have time now for that, because you will have to make an announcement.

CHAIRMAN: But the honourable member had the right to at least clear his name. I think it is only fair. This committee was appointed by us and we trusted the members we sent to represent us. He had a right to raise this in this committee and I think that the man who had led the delegation has a right to also explain and then we go.

MR KATJIOUNGUA: I suggest that our delegation tells the AG that the whole question of schools, privatization and standards and so on, these questions are being taken care of by this council and the AG must leave those matters to the future government of Namibia. He should do nothing until a new decision is taken by the future National assembly.

MR RUKORO: Mr Chairman, I got the distinct impression yesterday, talking to the AG, that he has made up his mind already and that he is going to go ahead with his deal of leasing public property to a private company. That is the first point. Secondly, he is relying on some false premises. For instance, he says these parents or grouping or whatever are concerned "about the English only education" which apparently is contained in our manifestos or coming from this house. I think it is false, because in none of our constitutions are we saying education or English shall be the medium of instruction only. In fact, our constitutions state the exact opposite. That is

the first thing. Secondly, they said they are concerned about mother-tongue and the standards of education which are going to be lowered. We have just read the SWAPO-constitution, guaranteeing those very things, and then thirdly, he said he was concerned about pupils, the children, being taken out of this country and registered in schools in the republic. Where is the evidence for this? Where are these things happening? Do we know these things? I think that we have somebody who is here who is trying to tell us he has been approaching, but as far as I am concerned, and surrounding all the circumstantial evidence, I feel he is part of this whole thing. He is on the planning of this whole thing for maybe Broenderbond related reasons and considerations, and I think we really need firm instructions from this standing committee that the subcommittee must go there, it must take a position on the question whether public utilities can be, not privatized, because he is, strictly speaking not privatizing them, he is simply leasing them, and I think, whether we overstepped our mandate or not, we indicated that we can't see why. Private companies should go there and build schools and not use public property. The funny thing is that you have you have a government building, you have kids of this country, you have teachers who presumably are on the payroll of the state now, and may even continue to be on the payroll of the state, from some of the implications of the discussion. The only thing that is interesting is the management function of these schools. That is where the leasing concept comes in, that the private company must come in and manage the schools.

MR BARNES: Mr Chairman, I listened to the honourable members report. There is one question which I feel I should address and that is the excuse of preventing children attending school in the republic. That is the right of everybody to attend school where they want to if the parents can afford it. We, as a result of the system of government, were forced to go to the republic at times, even for lack of accommodation. I do not think that excuse or hiding behind that excuse should channel our way of thinking. The basic issue here is that I think the AG is busy with something to perpetuate the status quo, and I am expressing myself very strongly on this. Government buildings, equipment are involved, the teachers are involved, not the teachers as much, but they are salary-drawing people of state funds. They are our responsibility whether we like it or not, and I think that we should take a very strongpoint and tell the AG "keep your hands off our property, we will decide, the government will decide at the appropriate time what they will do. "We have peace because we subscribe to the idea of private schools, but not at the cost of the tax-payer. So, I think that our committee, with due respect, should give an absolute straight directive. But the question that follows is: what will our modus operandi be if the AG does what South Africa has been doing all these years, whether you oppose something he will still go ahead and do it? It is useless giving our honourable committee a directive that he can go ahead, have private schools as if it is going out fashion, now at the cost of this country's property and assets. That is absolutely non-negotiable, and that we also say that in the event that he goes ahead with this – because I get the impression that the chairman of the subcommittee gave the impression that this was practically a fait accompli. Other quarters that somehow SWAPO has encouraged the kind of thinking reflected in the AG's moves. Our thinking on what our educational system should look like is reflected in our draft constitution. What you said, Mr Chairman is true. If the honourable Comrade Katjiuongua's brother, Nahas Angula, were here, he would precisely make this point, more eloquently and strongly, that we would want to encourage the private sector to, among other things, under take responsibility of building more schools for us. We would not encourage any activity that would have the effect of under mining public interest in the area of education for the purpose of satisfying the needs of a section of our community. We would not encourage such a move. Yes, the AG himself called in, from what I understand, not only a SWAPO person in charge of education, but also other spokespersons of other political parties to raise this matter, but I am confident, even though I was not the person called by the AG, that SWAPO would not, under any circumstances, encourage what the AG is doing. It is not in the best interest of the community at large. When we are talking about national reconciliation we should be frank about it. We should not, in the interest of national reconciliation encourage the kind of thinking that national reconciliation is okay as long as it promotes the interests of some section of our population. We should also see to it that the larger interest of our community is protected and in that sense what the AG is attempting to do is certainly not serving the larger interest of our people.

MR PRETORIOUS: Mr Chairman, this is a very delicate situation and I think we must not act too fast. I want to support the idea of Mr Katjuongua and Dr Katjavivi that we must try to talk to the parents.

MR MUDGE: I want to talk about the procedure. As I see it, the Constituent Assembly is not directly involved. We have agreed that the parties compose a delegation to go and see the AG and that the parties will then use the good offices of the chairman to make a statement. I feel strongly about this thing. I have a problem now. People are approaching us individually and as party leaders they want to get some direction from our side, and it will not be possible for me just to wait for a committee or a delegation to meet the AG on Monday and to report back on Tuesday. I think there is a large part of the white community who cannot support this move and they are waiting for direction from my side and from others. The AG is determined to go ahead. Mr Chairman, I don't want to start a quarrel with Mr Pretorius here, but as somebody who represents a large percentage of the white people, this whole thing was kept a secret. I was at no stage informed, consulted or in any approach. I hearing rumours, I had to rely on rumours, but the way this thing was done, makes it impossible for me to serve in a committee with Mr Pretorius because we are going to clash on this issue now. There is no doubt about that. I am going to have a problem with the church to which I belong, because even the way the church allowed themselves to be dragged into this thing, as a member of the reformed Church I am not aware of any discussions. I as a member of the Church was never consulted. So, all I want to ask is, when we approach the AG, Mr Pretorius must not insist on the right to be part of the delegation, he must not use us to make things easier for him now. I am very much disturbed about the development. What I want to ask is, will you allow me, if I am approached by people, to comment on this thing? I can't remain silent, sir, I cannot remain silent until Monday.

MR PRETORIUS: Article 17(4) (c): "No restrictions of whatever nature are imposed with respect to the admission of pupils or recruitment of staff based on race, colour" and then "or creed." That is giving me many problems, because I think that clashes with this declaration on the Elimination of all forms of Intolerance and Discrimination based on Religion or Belief." I couldn't lay my hands on the exact document, so I will give you all a copy of this report in the "Windhoek Advertiser" of January 7, 1982, but it is impossible for a private school, religious private schools not to discriminate on the basis of (c) as far as its staff and pupils are concerned. So, I want to ask whether the committee cannot have a look at it, please Mr Barnes: These are the things that we are guarding against. These are the things that we are trying to absolutely eliminate by way of terminology, inter alia, group rights versus these rights, by way of saying to a child "but you cannot be admitted to this school, because this school practices Catholicism, and you are not a Catholic", or "this school practices Christian National." I have now actually developed a complex on this word "Christian National." It gives me gooseflesh, Mr Chairman. At all stage I would like us to avoid opening the perpetuation of the quo or repeat history.

CHAIRMAN: I went to a Catholic school and I am not a catholic, but I wasn't stopped. If I wanted to apply to go there, why should I be stopped? But conventions are there, a woman is not going to go to the school of the monks, she is not going to apply for it.

Mr PRETORIUS: It is not the pupils as such, also the staff, because according to this United Nations document there must be freedom to religion, belief and worship and teaching, the right to train and appoint leaders." So, at a Catholic school I can't use a Christian National teaching to teach the catholic their religion.

CHAIRMAN: But suppose I am there teaching Biology or Mathematics? That school is a religious school, but I am a profession person to go and teach Mathematics.

Mr THIRIANGE: Let us not forget, as somebody has said here, that we are emerging from the nightmare of apartheid. We are not an ideal society up to now and we want to plug all the loopholes that can be used to bring about that nightmare again. So, therefore I don't want a constitution that will be interpreted by anybody in the future to perpetuate or to bring about apartheid, and if we go by the honourable member's suggestion, we are exactly doing that. So, therefore we have no problem, some of us went to these schools although we did not belong to those religions. There is only Church that has been notorious and it is the Dutch Reformed Church, when it comes to the black people and maybe we want to maintain that and we cannot allow that. So, therefore we cannot have things that will be used in future for apartheid. Therefore, creed or no creed, there is no room for discrimination.

Mr PRETORIUS: I have very much respect and understanding for the honourable member's emotional approach of this question, but again I want refer it to the committee, that it a point of difference, to look at it as far as the habit is in the rest of world, as for as creed is concerned.

Mr MUDGE: I don't want to use this opportunity to discuss the principle; I think Mr Pretorius has indicated that he wants a discussion to take place some other times on this issue. Of course, I am tempted to react immediately, but if you agree that we can discuss the whole principle of group rights and admission of pupils to schools, private schools, we can arrange such a discussion, but frankly, I just cannot agree that this should be amended. But I am prepared to discuss it. Once you start, and we have been through this many times over the past years, and I tell you that many people in this country still believe that this is another way of keeping schools racially segregated. And please, sir, I am Afrikaans-speaking white, you must have no doubt about that, I want my language so be protected....

Member: your religion?

Mr MUDGE: My religion to be protected. I want it to be protected, my language and my religion, but not this way.

CHAIRMAN: What religion do you belong to?

Mr MUDGE: The Dutch reform Church. That is the problem right now.

Mr RUPPLE: May I suggest as a matter of principle again, we just get clarity on the procedure from here. If it is clear in this room that there is no chance of reconciliation of different viewpoints, then that should be formulated and that should go back to the Assembly to be voted on. That is the only way one can break the deadlock in these circumstances. We obviously try and negotiate as far as one can I think that is why we sit here, but if it is clear that there is no way these different, irreconcilable points of view can be settled, then that is matter for the vote, and there is no point in going over it and over it and referring it to another committee and coming back here and being debated. We will only waste time.

MR BESSINGER: I understand the problem that the previous speaker is trying to deal with, but we have to draw the lines. I have also attended Catholic schools throughout my life and I can assure you the majority of the teachers who taught me were not Catholic teachers. Having said that, I want to come to the opening remarks which were made in the Constituent Assembly by a member of the ACN in this maiden address? He said that they have accepted that the South West Africa that they have known shall never be. We on the majority side of the House felt that at least rigidity had been removed and flexibility installed. So here we are in the interest of all, and I think we must say the spirit that prevailed around this table has been one of understanding, there have not been occasions where muscles have been shown or people being pushed around. So, I would ask the minorities also to be understanding and to show understanding. Things must change. If the mathematical formula has to prevail that you want to move two sides. If you want to maintain equilibrium, then you must have equal and opposite forces. So, I will appeal to ACN to stick to that beautiful speech that they have opened the Constituent Assembly with.

CHAIRMAN: As the Chairman I just made a statement, so we can move on. This is a very emotional issue; we are operating in a spirit of co-operation, brotherhood and also in a spirit of reconciliation. It also refers to the education forces. We will come to know one another and trust is developed, so that the fears of the unknown are also being removed. In that regard, maybe without changing anything in this paragraph, the honourable member is asking to discuss it later on. Maybe he wants to go and consult other members of his group after receiving his education here, and also having received our strong point of view. So, maybe it will be fair to allow you to go and talk to your people and say: "This is what they are saying, they are not going to change", and then allow him to come back and we will face the same thing. It is a compromise and not just to say "We are not going to listen to you ". He is a colleague, he has a big problem. Not that we are going to go back to apartheid, that is out, but allow him the chance to maybe go and explain to the others, then to come back and again discuss it, without changing anything here. Article 18, electoral rights.

MR MUDGE: I don't want to be very technical; I just want a general discussion to express our fears and reservation fears and reservations about an executive president. But I want to start off by saying that when I refer to ceremonial president and an executive president, maybe we are over-simplifying the matter, because we also don't want a useless and powerless president - that is also wrong. I was reported wrongly on radio the other day when I said the president must not

belong to a party at all. That is not correct. I said he must, in the execution of his duties, be above politics. That is what is said. But we, after having read this document and you have to look not only at the powers of the president when you discuss the powers of the president, you must also look at the powers of the prime minister, the powers of the president. I have no doubt in my mind that SWAPO will appoint a president, they will decide who the president will be, and they will decide who the prime minister is going to be and they will decide who the ministers are going to be. I have no doubt about that. So, I am not talking about my party's position in the government. When I look at the powers of the council of ministers, frankly, the first impression that you get when you look at their powers that they don't have any powers. All the power vest in the president. When you look at their powers, you get the impression that they are just there to advise the president. They cannot even give him instructions, they cannot even make firm recommendations, and frankly, Sir, to give so much power in the hands of one person, whoever that person might be, that is not important, because we are drafting a constitution for future generations. It is with much concern that we have taken note of that. What we want to ask at this point in time, having identified this as point of dispute, whether we shall discuss it right now or whether we should identify, report back to the assembly and whether you think it will be possible to come to some sort of an agreement, or whether you are actually firm that this is the bottom-line, you are not even prepared to discuss it. If you say "Let us discuss it, let's see if we can find each other half-way", maybe we can do that. I have now just made a very general remark about the powers of the president and the sort of lack of power on the part of the prime minister and the council of ministers. I want to leave it there so that we can discuss that point. Maybe even if you feel like it we can in private conversations talk about it to see if we cannot get an understanding as far as that is concerned. We are used to a system of government where the ministers have power, where the prime minister has an important role to play and where the president – we never had a president.

MR GURIRAB: We have agreed that this would be one of the most contentious areas of our work, and it is an area that hinges on so many considerations. For us the president of the Republic should be seen as a father-figure, as a symbol of the authority of the nation and that is why we go ahead and provide that he be elected by all those who are qualified to participate in the vote. There are different models. Honourable Mr. Mudge sided with the South African model, its evolution and so on, throughout the campaign and particularly when the various drafts were introduced repeated references were being made to the American Presidency, probably the most powerful presidency on earth. Whether a president is an executive president or any of the other variants, ceremonial and others in-between the two, it is a question of the relationship of the presidency to other organs of the government, like cabinet, legislature. In the case of the American presidency what is taken to mean difference in the management of the affairs of the state and the government is the so-called checks and balances, how the power of the president relates to other important organs of the state and the government. So, it is not simply a question of an executive president, it is how he relates to other institutions. You cannot have a strong executive president and at the same time have a strong prime minister. In the Common Wealth countries usually there is a ceremonial president and an executive prime minister, i.e. Mrs. Thatcher, the prime minister of Canada, the prime minister of Australia and so on, and the prime minister of Zimbabwe until a change was made in that former Prime Minister Mugabe became executive president. So, we need to relate the concept of executive presidency to what is provided for. Since we provided for an executive president and the cabinet serves at the behest of the president and therefore its powers are limited, so we would want a prime minister who would be appointed by the president, but who would administer the government affairs. That is my initial contribution.

MR HAMUTENYA: I think I was surprised when Mr Mudge pointed out the problem regarding the powers of the president in relation to the cabinet and the prime minister. I expected him to talk about the legislature and the judiciary, but he didn't say anything about that. Maybe this is where we went off in different directions in drafting this. We wanted to curb the powers of the president in relation to the judiciary and the legislature to which his accountable in so many instances, and which have the power to remove him from office if he abuses his powers and responsibilities. I think they are the most effective checks and balances which the American system has. So,

therefore I want to say we should look at the powers of the presidency in relationship to those two branches of the state machinery and less to the prime ministers.

Mudge: NEITHER of these two titles appears in any one of the constitutions. We believe in the separation of powers, Mr Hamutenya. I agree separation of power between the executive, the legislative and judiciary. That is where the separation of power should be - that is where you get the checks and balances brought in to the system of government. We got used to a system and you will have to convince us now that it is not going to happen what has apparently happened, seen from here, from a distance, in many of our neighbouring countries. I was in Lusaka, you will remember, in 1984. Many people thought that while we were there we were only fighting. It is true, we had discussions with members from the Zambian government and other governments privately, having soda-water, and the impression we got was that ministers in many of those countries have the feeling that they are sort of just there; they are just glorified members of parliament. That is the impression we got, and feel checks and balances can only really work when all the power is not concentrated in the hand of one person. So, let us not quarrel about the title, let's not make things more difficult for ourselves by saying we want a ceremonial president and you want an executive president. Let's look at the powers of the president, let's look at the constraints that we impose on a single person to just do it his way. Let us talk sensibly. I have been involved in drafting constitutions for a long time. I cannot remember that in my whole political career progress was made in one day as the progress that we have made today. Sir, we have been discussing a Bill of fundamental Rights between the internal parties for months with our reaching agreement. We have done it in one day what normally took us months. It is unbelievable; I never thought it was possible. Now we come to the one point where we appear to disagree and I have a feeling we will also be able to solve that problem, because we have convinced each other, I hope, that we are not trying to discuss apartheid, defend apartheid, defend an unjust society. We know that you also agree with a democratic society, so it is just a matter of finding a solution to a problem which has been worrying us for a long time, the fear for dictatorship, the fear for concentrating power in the hands of one person, our fear that we might end up with an undemocratic society, the fact that things can get out of hand and it is now for us, over the coming days to discuss this problem. You must explain to us now how you see that there could be some restrictions, some restraints placed upon the state President so that he cannot do things on his own.

MR HAMUTENYA: Before Mr Mudge can do that, I would like to just say one thing. He has already pointed out one thing; he mentioned the experience in Zambia. I think his point is not far from the truth, and there are two circumstances which need to be pointed out here. One of these, there is a phenomenon of one-party state. The other is that again in Zambia you have one party-state, to begin, with then there is another system where the central committee is supreme to the cabinet. The colleagues of the presidents are members of the central committee and not the cabinet. So, that is the problem there. I think that is only..... in a single party state. When you have a multi-party system the president and his colleagues are sensitive to the views of the other parties and they have no monopoly to turn the central committee of the president into a cabinet over and above the real cabinet. So, I think we have taken care of that particular problem.

CHAIRMAN: If we can maybe now clarify further and then look at the separation of powers concept, i.e. the executive, the legislature and the judiciary. It is within that one can check the powers of the president. So, if we are going to instruct the committee, it is to look at how independent the president is from the judiciary, for instance, and from the legislature. Some of us grew up under an executive presidency. I never had any government here when I left. I live in America and in Zambia. In America you have an executive president, but just take one example. The president is very powerful in America, Cabinet is nothing there. It is to advise the president. The cabinet is nothing there, just like the Zambians one. Sometimes advisors are more powerful than the ministers. Kissinger was. He was a minister, but he was an advisor on national security. So cabinet is nothing in America too. Then you see the role the congress or the senate play in trying to check the powers of the president. Reagan, for instance, vetoed this anti-apartheid bill, and the house by a two thirds majority can overrule the president's veto. That is how the sanctions have been applied, because while the president was powerful and refused and vetoed the bill, the house again had power by two thirds to overrule him. That is how these checks and balances are working. So, it's a question of the Supreme Court sitting there and interpreting the

laws, whether the president or anybody else is acting in a legal fashion and can overrule the president, say he was unlawful. It never happens basically. The people are civilized; they know what is within the powers of their mandate and so on. But maybe in instructing the legal experts to look at the separation of powers so that we can see whether we have proper built-in checks and balances in those three branches. Then title doesn't matter too much.

DR TJITENDERO: I thought I would just make two points contributing to the discussion. One is that I remember the statements made after the election results and one of them that was far-reaching was that the victory was for the birth of democracy in Namibia. That to me meant a member of things. One is that at least a small nation in Namibia is beginning to mark a turning point in the politics of southern Africa and hopefully make a mark of influence in the world as a whole. I am saying birth of democracy, and I think the things we have proposed here in this constitution, I think if we are concerned with checks and balances, one of the things that we will be proud of as founding fathers and mothers, is that we are saying the term of office the president would not be the conventional terms where the person serves until he or she dies. We have specified a very specific term of office. That is one element of checks and balances. In ours we say a five year term. Then on top that we are talking about the Assembly's power to impeach the president.

MR BARNES: I listened to the reasonable explanations of the honourable comrades. The question that was asked by my colleague was, is the executive president concept a bottom-line, because if it is a bottom-line, we can perhaps then carry on with the other matters and then refer this to the general assembly, saying that this is a bottom-line where we are very firm on a president, there is no doubt about that; (b) that although the terminology "ceremonial president" is used, we feel that the president must have certain powers, but we feel for our particular new start in sovereign independence, the fears, the uncertainties, that all those things can be accommodated in an executive prime minister with his cabinet. The fact remains, sir, that on this point we are not in dispute with each other. Should this Assembly be changed into the government, obviously your prime minister will rule in cabinet with the legislator. It would perhaps be favourable to consider an exercise to first contribute to national conciliation and nation building that could benefit the entire independence process in sovereign independence. But SWAPO's bottom line is an executive president, no matter what the discussions should evolve around that situation, we have a problem that we cannot perhaps find a solution, and think this is where my honourable colleague, Mr Mudge, made mention of how much give and take there is on both sides. We have already made mention of the fact that the concept of ceremonial president, we are not firm on the title and we feel that certain powers should be given to the president. From our side, what we stood for prior to the election result is already a small step in the spirit of give and take. So, against that background I can perhaps repeat the question, if we can perhaps simplify the discussion by knowing is leeway.

MR HAMUTENYA: I just want to follow up on what honourable Ruppel has said. We are not really talking about any bottom-lines of any kind. It is give and take. If we run in to difficulties we can postpone the discussion and go to another thing and come back to it, until we find out what the understanding is. But I think for now if we can still do ourselves a good service if we continue to probe the meanings, so that somehow we get clarity and a common understanding as to what is being proposed here.

MR HAMUTENYA: I would like to agree with the proposal by honourable Mudge that we now adjourn until Monday. Earlier on we said as far as SWAPO is concerned, there are three major areas of differences. One of them, the one we are dealing with now, the other one was legislature, the third proportional representation. In our caucus we had resolved to inform the committee that we are not fighting on the question of proportional representation. We are prepared to agree to your proposals. TRALISE, we don't want to rule from Windhoek. Taking that into account, it makes it more important for us that we should reach an agreement on the powers of the president, because we have to find checks and balances now. But I want to repeat, I don't have any problems. I am sure that we will be able to find an agreement on the bicameral system and the proportional representation as long as long as we feel happy that right from the outset all the checks and balances needed are in here. I have a few ideas, I made notes, I will go back to my caucus. Mr Barnes and myself do agree, because we have been sitting all night with Mr

Matjila and Mr Staby, but let us spend another day or two and we come back on Monday and then we can proceed.

STANDING COMMITTEE ON STANDING RULES AND ORDERS AND INTERNAL ARRANGEMENTS

WINDHOEK

11 DECEMBER 1989

MR MUDGE: I want to make one thing clear which seems to be overlooked. The problem that we have the whole idea of privatizing schools is not that we consider this only to affect black people. The pupils and parents of many towns and villages are terribly concerned about this whole thing, because it will affect the other fifty schools. What is going to happen to the other fifty schools if the top-class students and more wealth parents send their children to the private schools? Those schools will definitely not be able to accommodate all the children. So, not all white pupils are going to benefit from this, and for that reason my party and the white members of the DTA are very much opposed to the privatization of school buildings, and I think we will want to have the opportunity to express our concern. The impression must not be created that is now only black people who are opposed to the privatization. There are hundreds of white people who are opposed to that, because this is going to be a sort of "rykmans-apartheid." The more wealthy people and the clever children will go to private schools and the other pupils from Outjo, Otavi, Omaruru, Usakos, Mariental, and all those other places will find themselves in a very difficult position. There was a misunderstanding last week, I'm afraid. I did not react because I was under the impression the committee will react at a later stage. But as a later stage, but as a leader of a group of people I will have to react and express my grave concern about these developments. I would want to know what is going to happen now. Is the AG going to go ahead or is he prepared to wait?

MR TJITENDERO: Point number one was that all the proposals have included provision for private education for an independent Namibia. Secondly, the AG should not proceed with the exercise of privatizing state schools. Number three, the present arrangements regarding schools and education will continue until the present draft constitution comes into effect. Number four, the standing committee stands ready to meet the concerned parents. Five, a statement ready to meet the concerned parents. Five, a statement covering these five points will be issued by the standing committee.

Mr. MUDGE: We won't have black children and white children after independence.

Mr PRETORIUS: For Example, article 32 is referring to colonialism and apartheid. So, all I want to know

CHAIRMAN: We didn't agree to remove reference to apartheid. It is a fact of life we suffered through and lived with.

Mr PRETORIUS: That is correct, but that is also something of the past. It is too specific for me because otherwise would want to include communism, etc.

CHAIRMAN: We didn't suffer under communism in this country so far. But apartheid is what we don't like in this country. We all seem to agree now, even in South Africa, apartheid is bad.

Mr PRETORIUS: But to explain it to my people if they ask me if I have accepted it. I will say no, I preferred to delete it.

CHAIRMAN: Yes, your people must accept democracy.

Mr PRETORIUS: so I still will have the right to say that.

CHAIRMAN: But do your people still believe in apartheid?

Mr PRETORIUS: No, they believe in differentiation, diversity and minority rights.

Mr MUDGE: You were right when you said we agreed that we cannot expect you to forget the past, we said we don't want to emphasize it too much, that communism was never practiced in this country, but apartheid was practiced In this country. So, I have understanding for people who have a feeling that there must be some reference to it.

MR KATJIUONGUA: I am also concerned about the pace of progress we are making. When you talk about this question of the president, I discovered three versions in the debate in the

assembly. One version is mine where the president is not exactly ceremonial, as some of you tend to understand, mine is more of a division of powers than purely a ceremonial role, as some people tend to ascribe to the president. Then they are those who are saying the president should have executive powers with the prime minister merely as a bureaucrat, and then there was a version by Mr Rukoro of a parliamentary president, which I don't know exactly where he got that from, but unfortunately he is not here to explain that. If you say the president must be accountable to parliament, it must also be related to the source of his election, how he was elected. If he was directly elected by the people, as it is proposed here, and not elected by parliament, as some people also proposed, then you have a problem how a person not elected by parliament can be accountable to parliament. You have a problem there. I also understand the point mentioned by one of my colleagues here, sometimes – and I think we must also be realistic – we tend to see the situation that we have now, and I think people assume that maybe I am not going to be the president, maybe somebody else, and let's make the office of the president useless because he is not mine. But if the constitution is going to be long term, then maybe your turn will also come and how would you feel if the thing is useless? Maybe we should consider all these possibilities and see how in between there we can come to a solution that all of us see as an institution and not necessarily a personality that is there. But else my position, more as my views, on the presidency are the same as I said in my statement, but certainly I am there for discussion and debate and to find out what others also feel, and whether somewhere along the road we can find something that all of us can live with. Consultation, at least he should do it in consultation. I think there are a few points that we will have to discuss it. We will not be to do that today, not in an hour's time it is not possible. I think we can report to the Assembly that we made progress on two issues, that as far as parliament is concerned and the president there are still a few issues that will have to be sorted out as far as the powers of the president is concerned and the bi or Assembly adjourns immediately and refer these matters back to this or another committees, whatever they might want to decide. We have another week and then we bring in our consultants. I don't know whether you feel pessimistic, I don't. I think we are going to make progress, but somehow we have to report back to the Assembly tomorrow, and I think it would also be improper for this committee to now also solve the problem. We were supposed to identify the problems, not to solve the problems. I think we must have a new term of reference and then we can continue next week. Frankly, Sir, I think we also have to before tomorrow at least have some idea whether have, for instance, differences of opinion on justice, whether we have differences of opinion on local government – and I think we have. We have to identify them, because we have to report back tomorrow, and on the question of a very important issue, communal land. That is a thorny issue that we somehow have to discuss, and say that this is also a matter that we

Issue we want to further discuss. So, instead of going on now on the president, let us just find out whether there are other issues. Mr Katjiuongua had a list, I have it in front of me, I think we should see if there are issues on that list that we also want to report back, and then after tomorrow we start working on these differences and see if we can't find the solutions.

MR KATJIUONGUS: Just to add to what Mr Mudge is saying, for the sake of progress, and in the light of our terms of reference. I think tomorrow we must be in a position to report some progress. We can't say we have been doing nothing.

MR BESSINGER: I think in reporting back to the Assembly we should use, as we have done in our deliberation, the constitution that has been proposed by SWAPO and which has been used as working document. According to my notes there are certain areas that have been referred committees, there are certain areas that had to be subjected to rephrasing of the wording, there are certain paragraphs which have been accepted without, at this point, any dispute.

MR BESSINGER: Yes, that will also have to be stated, but I will not advise the honourable Mr. Pretorius as to use the floor of the Assembly to state categorically to his constituency that he has not agreed with us. So, I don't think we have a problem with that. But the basic idea is to quantify what we have agreed on, tremendous progress. So, to go to the assembly and leave the general public with the impression that there are more disputes than agreements is a totally wrong impression.

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MR RUPPEL: Yes, I have been informed by the lawyers had the benefit of consulting that it has been incorporated, it is more future-looking now. It still incorporates a reference to the past so that there is a proper context of where we operate in. I didn't have the time to check word against word here, but I have been assured that it is in, and I would suggest Mr Mudge goes through it and see whether he now agrees with it.

MR MUDGE: May I just make sure that there is not a misunderstanding, because I personally feel very strongly that there must be no friction whatsoever. We must avoid suspicion that could exist.

MR RUPEL: The answer to that, as we understood it, is that will take our first draft as a working document, we will then listen to the problems, discuss them as we did before. We will then go and do our homework and come back with a draft which would substitute the first draft in an attempt to meet what we have discussed. It is subject to further discussion and, more important subject to this heavenly lawyers coming down to us and satisfying everybody. I think that is the understanding on which we worked, we put in a lot of work, I must tell you that.

MR MUDGE: No, Mr Chairman, I am afraid there is a very serious misunderstanding and I can only hope that will sort that out. We were prepared to accept the SWAPO-proposal as a working document, but after having done that, SWAPO-document and the DTA-document and all the other documents would disappear from the table. Then we will have our document which will then be our constitution. But we can end up with revised SWAPO-proposal accept as the constitution for Namibia. Please, do not do this to the other parties. We can accept your document as a working document, but then we marry and a new document will then be born out of this and this document will be our document, not a particular party's document which was amended to accommodate other parties. I don't think that is the understanding, and I will really hope that this will not be expected from the other parties. We are only prepared and we are really prepared to accept your proposal as working document. That is where it stops.

MR GURIRAB: I hope we are not missing one another along the way. I think the revised document would not be a SWAPO-document, it would be a document, it would be a document as amended, as revised per discussion that we had here. It was an initiative taken by SWAPO to incorporate the views expressed here, areas of agreement and so on. So, it is not as if SWAPO continuous to be beholden to its document and is merely trying to just sugar-coat it for the other parties. It was a sincere and faithful effort to reflect what we agreed here in this revised text. Of course, you did not have the benefit of going through it and therefore perhaps the questions that are coming up in your mind are justified, but if you perhaps had an opportunity to look at hoe the document has been revised, then perhaps your fears would be removed.

MR KATJIOUNGUA: Act of parliament, I think we said that the committee on symbols will be appointed by this committee before independence.

CHAIRMAN: There is a correction.

MR MUDGE: There is no problem, all we want to say is that ultimately the symbols will have to be approved by an act of parliament.

MR RUKORO: My understanding was that the subcommittee on symbols is doing to work now, so that their final product is accepted by this Constituent Assembly and forms part of this constitution and are not left over for an act of parliament after independence. In other words, it must be determined now before independence and become part of the constitution.

CHAIRMAN: The SWAPO-document was saying three months after independence. So, we will change that. We must go ahead and appoint a committee.

Dr HAMUTENYA: I would like to say that I think it is sufficient to say that the constitution will be amended by a two-thirds majority. I don't think it is necessary to make provisions that certain things are sacrosanct and therefore cannot be amend. Otherwise we can go on and so many

things are sacrosanct that they will be beyond any amendment. I think we must just leave it at that point.

Dr TJITENDERO: I agree with Hidipo that the elaboration part of it is not necessary. If something is so dear to the values of Namibia, it will go without saying, and therefore to say in the constitution that this cannot be changed under any circumstances, I think it is not an appropriate thing at this point, because that is exactly what we are trying to do with the constitution. We are writing it as a lasting document and for it to last, it must appeal and must be continuously relevant to the changing circumstances of the society, but it should not be a matter of act or law that you say even if the circumstances have changed so drastically, we should not change or contemplate an amendment. So, I cannot think it is necessary. It is taken in by the... position.

Mr RUKORO: I am one of those who subscribe to the notion of this idea that certain values are so important and so fundamental to the type of society that we want to create, that having secured them with our independence now in this constitution, they should remain there forever. They should not be subject to the changing like majorities in parliament at any given point in time, and that is why, for instance, also in my submission at point 6(13)(2) I propose that no amendment of the constitution that has the effect of removing the democratic and republic nature of the state should be entertained at all. But I am reasonable to arguments, such as the one introduced by honourable member Dr Tjitendero, that things do change, times do change and so on, and that maybe to bind oneself in this irrevocable manner for generations to come might be politically unhealthy. But in that case I would then say, instead of a two-thirds we should require a three-quarters majority as a compromise.

Mr. ANGULA: The idea under discussion tend to imply to me that what we are trying to say is that certain things should never change, never, ever, but we know from our experiences the world is moving, there is always progress in thoughts and ideas, and that progress will continue to come. To amend does not mean to take away something. You may also add something new, something which has just come up. The very thing we are talking about, human right was not there. It is something of recent times, and I would think that we also want to keep in touch with the coming changes and we should at least allow ourselves to include those changes in our constitution if we so feel, or least the coming generations. I would like to say that a document like a constitution is a word of faith by and large. It is nice to have it written as we want it, but let's not forget that much will depend upon ourselves as people. I think really we should allow the possibility of change to take place. It is part of progress.

Mr KATJIUONGUA: Mr Chairman, first with reference to the mandate to constitutional principles, the principles designate a procedure by which the constitution, this one, is going to be adopted. It does not specify by which method a future constitution may be amended. It may be amended only by a designated process involving the legislature and of votes cast in a popular referendum. So, I think the point is open when we talk about the parameters of the 1982 principles. So, I think here we have agreed that the constitution may be amended by a two-thirds majority of the legislature. When I gave my statement, I took into account the question of flexibility to be compatible with some form of rigidity. So it is not changed every time a political party wants change or when there is a change in political leadership. I was having in mind the constitution of the communist party of China, the communist party of the Soviet Union and even the state Constitution which is changed every time there is a change of political leadership. That is why I thought a fairly rigid constitution is necessary. But I said fairly rigid, amend only when it is in the in the national interest to do so for the sole purpose of good government. Those are important criteria's as far as I am concerned when you have to amend a constitution. In many constitutions I have read, and talking to many constitutional lawyers as well, constitutions do – and I said in y statement that certain rights are considered as everlasting and fundament that are not subject to changes sometimes, and for example the rights in respect of the dignity of a human being, the freedom of expression and the right of existence of a political party. Some lawyers see those as rights that should not be subject to a state of emergency and things like that. When you talk about page 8, article 14, if that right is there, but can also be suspended in times of emergencies, then I disagree. But I think therefore there is a need to specify which rights cannot be amended. We should not say nothing can be amended, that is also maybe not correct. I think we should be more specific and say which rights are fundamental and in that sense cannot be suspended or amended in the constitution. Then I think we are talking business. I seem to say that because we have agreed the constitution can be

amended by a two-thirds majority, then even some of these rights must be amended. Then I tell you a two-thirds majority is not always difficult to obtain. You can get it through the front door or through the back-gate, whatever the case may be. But I think that we are building a civilization – this is my concern – a permanent civilization, certain things in our country must be taken for granted as part of our society, as part of our national values, and not subject to the whims of the political market.

But on the other hand it is also subject to human failure. If you care to remember, in 1933 in Germany a party which wasn't even the majority party used a trick to get to power and eventually in the passage of a few years time, changed what was a democracy into a fascist state. It wasn't even a majority. We are no better or no worse than anybody else that preceded us. The result of what happened in Germany was that the German Constitution in fact now contains certain stipulations with regard to the conduct of political parties, which prohibits the change of the essence the state. It does permit change of the constitution, it does permit changes to the law and so forth, but the essence of the state may not be changed, obviously because the German-people had a negative experience with regard to the application of power. From the international universal Declaration of Human Rights and you can go back to the American Rights. Where do you really end? One can always look and find one that is not there, because it is in a certain convention and we want to include it. Where we are going to end?

Mr GURIRAB: partly the same point, but not perhaps for the same reasons. The extent to which we must be exhausted in the draft about all those rights that we might agree around this table are fundamental, or all those rights which, because they are fundamental, are included in so many conventions that we all embrace. So, where do we really end about enumerating in the constitution all these beautiful rights? In terms of schools I can think of so many conventions and civil and political rights, on economic, social, cultural rights and so on that are international documents. Are we going to be so exhaustive as to include them all? Look for those that are not there and then added on to what we have agreed to? I have some problems there. When we are going to be satisfied that all the rights defined as fundamental are incorporated in this constitution? There are so many conventions on these rights.

Mr RUKORO: I have no intention of copying verbatim all the international human rights documents in our constitution, but there are some important clauses which are simply so important that we have to include them in our own constitution, because international treaties, I don't know what the constitution law of this country is going to be. There is a limit to the international agreements like treaties and so on, which individual citizens in some circumstances cannot even evoke in their own local courts. So, I would want to have adequate remedies in terms of municipal law, rather than to rely on an international mechanism which can take up to five years simply to redress a particular grievance. I know in the civil and political Convention there is a right to marry and raise a family according to one's own free will. It is not here, I do not intend to put in here, because I think it is so obvious that nobody can even come and say, "No Rukoro, you cannot marry that beautiful wife of yours, you must marry Ruppel's daughter or sister." There are some others like the rights to social security and a living standard which is consistent with good health, etc. It is not in our document and I think it paramount for the type of constituencies that some of us represent. That is why I feel that those really need to be singled out and to be included now in this constitution.

Mr MUDGE: I want to agree with Mr Gurirab that one must really distinguish between rights and fundamental rights. If we have to draw up a list of rights, there would be probably several hundreds of them. It doesn't mean that they

Need not be included in the constitution, but under the chapter, fundamental rights, I think we must be careful not to include every right as if they are all fundamental rights. Then I would suggest that when we get the constitutional lawyer, the one who has to finally draft our constitution, we hope that he will also be a specialist in the field of fundamental rights, because he might point out to us that maybe we should include some of those, he might even suggest that we leave out some of those that we have included. But when you talk about fundamental rights, I think we must be very clear on that. We only want fundamental rights. Something that you go to court on, something that will not be changed easily and something that you can rely on for the future. Then I don't want to bore you, but I want to repeat again, I will very strongly insist that we stick to personal, individual rights. But I think if we leave this for these experts, or for the man who has

the drafted thing. I think he will be able to help us a lot. Mr Rukoro, don't get me wrong, I see the importance the right to be employed in the civil service. It is a right, but is it a fundamental right?

MRS ITHANA: We agree that the words from "except" up to the end must go. So, that it reads: "No person shall be deprived of his right or personal liberty."

Mr ANGULA: Yes, I think that is a progressive step, but you must know what that implies. It means no death sentence in Namibia.

CHAIRMAN: That was the whole debate.

Mr ANGULA: If that is what you are saying you must be careful.

Mr MUDGE: That is what we are saying, whether we agree or not.

CHAIRMAN: We are clear, no death sentence even if it is something very bad.

Mr BESSINGER: I am afraid that either I as individual was misled. After further consultation it was said that the "except according to procedures established by law" should remain. For that sole reason that until you have cleared up this issue of this sentence, we cannot remove that portion of the article. There are many grounds on which the death sentence is being argued for or against. We have to sort that out and then we can come back to that clause really, because we cannot just let it hang in the air like that. It hangs in the air with the deletion.

Mr RUKORO: This thing can be taken to mean that the life of a person is sacrosanct, except in deaths resulting from lawful acts of war. If we are in the war you have to shoot somebody in self-defence. So, that is one level where I will have no problem. If this particular proviso refers for instance to acts of war whereby soldiers and the police have to shoot in execution of their official functions - that is a different question. The proviso is intended to cover a judicially pronounced death sentence. If there are people who are for the death sentence as a verdict by a court of law, then maybe we need a debate on it. If there is nobody in favour of the death sentence, in that case I think we just have an agreement now on the question of death penalty. But if we talk in terms of the "according to the procedures established by law" in a different context, that I will accept, I have no problem with that one. We can even have "except according to the procedures", as it is, I have no problem with it if it means things like self-defence or acts of war. But if it is supposed to include and allow capital punishment, judicially pronounced, then I think we need a debate on it.

Mr ANGULA: yes, for the very reasons and for different reasons that honourable Rukoro is talking about, I just feel incompetent to decide on that myself. I think we need to consult a broad spectrum of the If we provide them with a fait accompli about the death sentence, I am not sure whether we are truly and fairly reflecting the society's desires and expectations. I don't know what the implications would be, but there must be provision. So, as much as I don't like capital punishment, I will also not be in a position to say no capital punishment in the law. I feel incompetence to do so.

Mr BESSINGER: I just want to elaborate a little further. It is an old argument whether there should be capital punishment or not, and this thing has been argued from many quarters. In some cases it has been argued that it acts as a deterrent, etc., but I am coming from a totally different approach. It has nothing to do with being a deterrent or not. I want to cite example. You have in the United States certain states where the death penalty is on the books, it is applied. You get other states where it is not applied. You get in Africa - and I take Tanzania as an example - where the death penalty is legally applied, but it is used only in extreme case. The reason why we are saying that is precisely coming to your argument. There are occasions where an act perpetrated by an individual or individuals against society, that it provokes society to the point where, unless that death penalty is applied, it disrupts the function of society that as a whole, and that means that if the expression of society that the supreme penalty should be applied is oppressed and it cannot happen, it can lead to disaster. If we take - and I just want to point one case as an example of where society expresses itself very strongly - the Charles Manson cult -murder in the United States, it was done in a state where the death penalty didn't apply, but the whole society was screaming for the death penalty to be applied. You have another case where the death penalty wasn't applicable and it is one of our neighbours, Malawi, where a politician in the opposition stated his case. The state wanted to revert to applying the death penalty. So, I say it is something that needs to be there, but it needs to be used in a discretionary fashion. But if it is not there, it creates problems.

Dr TJITENDERO: it is ironic; I think I want to agree with the statement made by Nahas, at last.

CHAIRMAN: Honourable Mr Angula.

Dr TJITENDERO: I want to say two words, and that is, one; there is sufficient justification for maintenance of the death penalty and the function of death penalty itself to the society. I think we had enough case studies in sociology that it appears that it is not a deterrent because there is a statute that calls for the death penalty. I think if we were to be fair to ourselves as representatives, this is one of the issues that can be thrown out eventually on a referendum or whatever. But I don't think that there are sufficient grounds. I am inclined to believe that there are not sufficient grounds to maintain the death penalty in a contemporary constitution. There is just no basis for it. I think there are different ways in which human character can be reformed. By getting rid of the life you are not doing anything, the acts will still be perpetuated. So, in sociology there are different views of changing peoples' actions and behaviour through a model, but not through a death penalty, and I think I would like to agree with those who are advocating for the removal of the death penalty. It is not a deterrent at all.

Mr GURIRAS: MR Chairman, after all, life is perhaps first on the list of the rights that we consider as fundamental, and therefore, to deny any human being of his life is a basic. We go back to biblical days, to the very beginning of civil society.

Honourable Mr Bessinger recalled the state of affairs in the United State, for example. He is quite correct. Some states had it on their statutory books, others don't. Some states revoke the provision sometimes, they reinstate them later. It fluctuates like that all the time. There are times that I am for it personally; there are times when I am objective about it. If it strikes far away from me, I object as an intellectual, I would like to understand the mitigating circumstances under which somebody was killed. If it strikes home closer to me, my relative, my friend then I want that beast to be killed. So, to have it in the constitution invokes some of the things we are saying. Not to have it, on the other hand, what so we do? In this case now after lunch, I am for the retaining the formulation as it stands.

Mr RUPPLE: I think we have a choice here. I fully agree with the sentiments expressed by the honourable Comrade Angula. We do not really know what the people in this country want; there was no testing of the sentiments. It is not only about deterrents, it is also about revenge, the death sentence. I think that has been expressed here implicitly today. Sometimes if you don't have this release valve in a controlled fashion, people will go to the street to do the job. So, one has to carefully gauge the sentiments of the nation. But I think we have to do a basic decision here. We don't have time to test all these sentiments and go back to the people; we must make a decision here. We either say we provide for the death sentence or we don't provide for it. I myself feel that we should give it a try and not put it in the constitution. If the people so strongly feel that it should be in, it could be a debate in parliament in good time, there could be a referendum which could put it back for some reasons to be decided. But let's kick off on a nice note, let's give human rights a chance and let's respect human life in our first document. We can always, for good and sound reasons and on debate and testing the feelings of our society get it back. That is my approach.

CHIARMAN: I think the debate was extensive and sentiments were well expressed. I am very much impressed and we can go on.

Mr. RUKORO: I wanted to help you by proposing the summary of what honourable member Ruppel suggested that we proceed accordingly. We take out the death penalty until such time that we are confronted by a society that says: "no, we feel strongly about it, bring it in."

CHAIRMAN: The committee is divided and therefore, instead of debating, I would like to see those who like to have the retention of the clause as it is show hands. (Discussion) I can only go back to the rules that govern the whole house. This is a committee, there is a deadlock and the chairman can then rely on the rules of the House.

CHAIRMAN: the point is that this issue be referred to the whole Assembly.

Mr PRETORIUS: (4) (C): I still remain with my point of view, but I will talk about it in the Assembly.

MR MUDGE: on a point of order. If Mr Pretorius wants to discuss matters, and we can probably sort them out, and he is holding his views back, when are we going to discuss it then? He is becoming a dark horse now.

Mr PRETORIUS: we have already discussed it and I couldn't succeed in winning a majority. I was outvoted, so the ruling was that I am free to speak in the Assembly.

Mr MUDGE: So you want speak to the gallery?

Mr PRETORIUS: No, for the minority on the gallery.

Mr RUPPLE: Some people want to die fighting, that is all.

RUKORO: Then we come to the big thing, sub-article (5) (b): "The powers of the President to make such laws shall include the power to suspend the operation of any rule of the common law or Statute or any fundamental right protected by this Part, for such period and subject to such conditions as he may in his opinion consider necessary or expedient." I have thought that very clearly, consistent with international standards; we need a clause at the end of this chapter which contains certain rights and freedoms which simply cannot be derogated from irrespective of the nature of the emergency. For instance, all the authorities I have consulted suggest that the following is accepted uniformly, that you cannot, even if it is in time of war or whatever emergency, derogate from the right to life or freedom from torture, cruel, inhuman or degrading treatment. You can't say because there is war, let's torture people in order to get information or whatever. Freedom from slavery, freedom from ex post facto laws, freedom of thought, conscience and religion is never derogated from. The right to judicial personality. That is recognition as a person before the law. It does not affect emergency. The right to existence of a political party. But more important, which is the last one, the judicial guarantees essential for the protection of the non-derogable right as a basic right in itself. Thus we need a clause specifying those rights that are non-derogable, irrespective of the circumstances. Which means that in times of emergency maybe 95% of the Bill of rights can be derogated from in the national interest, but there is 5% that you just simply cannot touch and I think we need a provision to that effect.

Mr ANGULA: I just want to follow up a bit on what the honourable Mr Rukoro has said. First on (2) (b), the two-thirds majority. When you look at it from the point of view of suspending the fundamental rights, of course that is very important that we should now allow people to just too arbitrarily suspend them that they agree. But if we also look at the other side where society is being threatened by insurrection or something like that, they do need a position to deal with the problem and they don't know how one can do that. If it is so that you have to call parliament, somebody might be sick, somebody might be on holiday because this is an emergency, it was not planned, then the insurrection is going on, life is being destroyed and the very rights you are defending are being trampled upon by the forces of whatever it is. We also have to think as to how to protect society. That aspect we should also bring in, the other angle. How to make sure that to protect society for weeks, their fundamental rights you want to be maintained. So, that is one thing I want us to think carefully. Article (3), this declaration of a period of not less than six months at a time, I don't know what the drafter was meaning. Probably what he was meaning is that you can have it for more than six months. I don't know what the drafter meant to say. But I have no objections to putting "not more than". That is fine, but I have a problem with how to reach a decision to declare a state of emergency in order to protect society. I don't know we should have a procedure which is a bit flexible; otherwise the very society you are trying to protect will actually be in danger.

MR GURIRAB: I think I accept everything, except political parties. I don't think that is on par with the other. I am not very strong on that one. I don't know whether it is entirely necessary for political party to be sacrosanct.

MR RUKORO: In response to the issue raised by honourable member Gurirab, I concede that in all the documents that I went through all the other rights were enumerated. In one document all of them, in some only some and so on, but the right to exist as a political party does not appear in any of them. I just included it to accommodate my colleague here. The honourable delegate from the NPF had it in his submission. So, I agree with you that the fundamentality of it is questionable. But go back to comrade Angula; the first answer was is that nothing in article 22(2) prohibits the president from acting swiftly, even within minutes or hours of a serious emergency or a war, because it says it is for the president at any time by proclamation to declare a state emergency. Having done so he must lay this declaration before parliament, for parliament to endorse within seven days or to reject. So, his ability to protect society is unaffected. Secondly, two-third is necessary, because if there is a serious emergency, an insurrection, that is even more reason why you will have more than two-thirds of parliament agreeing with the president. But it is there as a protection against these things like where you had Margaret Thatcher, Because there is an election coming on, popularity is going down, you decide to declare war on a mini Banana

Republic somewhere, and then our soldiers are killed simply for political reasons. That is why you need parliament to say yes by an overwhelming majority it is in the national interest to go to war.

MRS ITHANA: I now entirely agree with honourable Comrade Rukoro. My problem was almost like his, but with the explanation that he gave I feel the rights that are to be guaranteed during the emergency must be really worked out, so that during a state of emergency people are not just going too bamboozled.

MR TJITENDERO: I do not see the affinity of the existence of the political party in relation to the fundamental rights that were enumerated there, and this is where we want to understand. It is true, the example of the honourable Tjiriange, I do not necessarily envisage a situation where the Supreme Court may not meet, because if the parliament can meet then obviously other institutions under the same circumstances may meet. But I do not see

University of Cape Town

STANDING COMMITTEE ON STANDING RULES AND ORDERS AND INTERNAL ARRANGEMENTS

WINDHOEK

14 DECEMBER 1989

MR RUPPEL: We propose eleven important checks:

1. The executive power shall vest in the Cabinet of Ministers, which will be headed by the President.
2. The president will, as we have discussed before, exercise his functions in terms of the constitution in consultation with members of the Cabinet.
3. The President can be removed from his high office on the grounds that he has been guilty of a violation of the constitution or serious violation of the laws of the land or gross misconduct or inaptitude, which would in the view of at least a two-thirds majority of the house (legislature) render him unfit to hold with dignity and honour him unfit to hold with dignity and honour his high office. That is basically the impeachment, the provision provides for a two-thirds majority of the house.
4. The President can also be removed as soon as he fails to qualify for being the president in the first place. He must meet certain qualifications to be able to be a candidate for presidency. If he during his term of office loses one of the qualifications, he is out of office.
5. There is a provision that the acts of the president, any action taken by him, pursuant to the powers vested in him can be reviewed, reversed or corrected if it is deemed necessary or appropriate by at least a two-thirds majority of the legislature and two-thirds of the Cabinet.
6. Appointments by the executive President shall be valid but could, similarly, be challenged by the same procedure as I have described a moment ago.
7. The President is empowered to terminate the services of any minister, but again this decision is subject to the same review, procedures as I have been referring to in respect of the previous, two kinds of actions.
8. The president will have no choice but to terminate an appointment to the cabinet if the legislature with a simple majority brings out a vote of no confidence against a particular minister.
9. If a bill is passed by the legislature with a two-thirds majority and passed on the President for signature, he will have to sign the bill. He cannot decline to do so.
10. If the bill is passed with less than two-thirds majority, the president may decline to sign the bill and he must then send the bill back to the legislature, which body may then decide to once again refer to the president. If he once again declines to sign, he must dissolve both the legislature and his own office and call for elections. It is basically if there is a deadlock between the ruling party president.
11. The legislature shall be dissolved, new elections called, if the president is advised to do so by his Prime Minister, acting in concurrence with the majority of the Cabinet, and that would then also mean that the president is up for elections again.
12. If he decides to withhold his assent to a bill on the grounds that he regards it as being unconstitutional, he can be overruled by the constitutional Court, and the court's ruling will be binding on the President.

That is if as far as the checks are concerned and with that I want to conclude.

Mudge: By way of introduction I just want to say that constitutions are written for the future of a democratic state, and I think we should always remember that. They should not be tied to the position of one or other political party or one or other political leader, and because of the statue and the influence of a specific political leader. I want to make it very clear, when we discuss this constitution and discuss the position of a President, we are not discussing Mr Sam Nujoma or Mr Biwa or any other person, we are discussing the position of a state president, because political leaders will come and go, but the constitution must be the stable and, as we see it, the everlasting basis for state institutions and the rule of law. I can refer you to the history of the world, maybe I should not, but I can refer to Washington, but I can

also refer to Hitler and Iddi Amin, and I am sure you will know the difference. We will feel very strongly about the concentration of power, because as we see it power corrupts and absolute power corrupts absolutely. The proposals in the working document, as I see it, have the inherent danger of establishing the system whereby the head of state exercises absolute power. We have listened to the honourable member Mr Ruppel only now, we will have to look at his proposals at a later stage, but in the meantime we are of the opinion that the head of state, in terms of his proposal will exercise absolute power. As a matter of fact, as we see it runs counter to the whole democratic doctrine of separation of powers, and I will try to prove that. I am not going to discuss the legislature now, I am only going to refer to the legislature to sort of highlight and emphasize the powers of the President. Look at section 34(4) (e): "The President has the power to appoint no more than six persons to the national assembly." The appointment of the members to the National Assembly runs contrarily to the democratic principle. That is the first point I want to make, the fact that he has the power to appoint six members to the National Assembly. (b): "In as far as the introduction of laws are concerned, the Assembly may not introduce them without the assent of the president." Article 57 (2). (c): "The President may decline to sign any law passed by the National Assembly." Article 48(2). Mr Ruppel has already reacted to that, but we will come back to that again. "The President may dissolve the National Assembly in three manners: (1) acting soloist, Article 34(2) (a), by refusing to sign any law passed by the National Assembly, Article 48 (3), and by doing so on the advice of the Prime Minister, acting with concurrence of the majority of the Council of Ministers, Article 48(5). It should be borne in mind that the President has the power to appoint these very ministers, the council of ministers.

Sir, if we look at the judiciary, and I am not going to discuss the judiciary, I am going to discuss the powers of President. The President has the power to appoint the Chief Justice, the judge President of the general Division, the president of the Constitutional Court and/or other judges – Article 34(2) (j) (cc). In so appointing them, he has to act in consultation with the council of Ministers and the judicial Services Commission – Article 74(4). The President has power to appoint all the members of the council of Ministers, as well as the members of the judicial Services Commission, those members who must advise him. He has the right to appoint them. Articles 34(2) (b), 34(2) (j) (aa), (bb), and (dd). The President has the power to discharge the members of the council of Ministers, as well as the members of the Judicial Services Commission by the same process, the people in consultation with whom he must now take decisions.

Thus, Mr Chairman, the President has complete power regarding the appointment of the Judges and by doing so can exercise direct authority in the judiciary.

I want to talk about the executive. The President is vested with the executive power of state and shall perform any act incidental to the discharge of the executive functions of the government – article 34(1)

Although provisions are made for a council of ministers, the president in the exercise of his functions is not obliged to follow the advice tendered by the council – article 33. In terms of article 31(4), the nomination of the President is regulated by a law of parliament. This creates the possibility that such a nomination becomes the prerogative of one party holding a simple majority in parliament. Also article 31(5) makes it possible that the President can hold office for life since no limitation as to his tenure of office is expressed, and since the removal of the president can only be effected by two-thirds majority in Parliament – article 31(6), the possibility of removing a president has been given by the honourable Mr Ruppel mainly as ways and means to remove the president. I just want to say at this stage, I don't think we should rely too much on the removal of the President, I don't think we should follow the example of those countries who every two years remove a president. That is not what we have in mind. We don't want to remove presidents, we want to keep them, but we don't want them to find themselves in the position where they can abuse power.

The proposals in the working document concerning the president are also, as we see it, politically unwise, and practically impossible. The direct election of a president in accordance with the SWAPO-proposals, or the working document emphasize ethnic divisions, and I think we must do everything in our power to avoid that, because such an occurrence could very well lead to national disunity.

Further to this question of the direct election of a president after every five year. It will also mean that two national elections – one for a National Assembly and one for a president – will be held at the same time and apart from the administrative cost other complications, this lead to overall disruption of National life. Politically the proposal for a directly elected president is unsound and dangerous, because it denies the existence of a multi party system and begs for the..... of all state powers and the creation of a one-party system. That is our view. I want to give you a few arguments on behalf of our delegation in favour of a parliamentary head of state, and I want to repeat that, a parliament head of state. We are not talking about a ceremonial President, I think we should avoid that terminology altogether. We talk about parliamentary head of state, because such a parliamentary head of state assures the upholding and, indeed, safeguarding of a certain democratic doctrine of separation of powers in so far as the president, as head of the executive, is guided by the wishes of his executive and cannot encroach either on the powers of the legislature or the judiciary. The parliamentary of state is in fact the guardian of the doctrine of the separation of powers. He assures that the judiciary remains independent at all times, that the legislature embodies the wishes of the people and that the executive follows he demands of the legislature. It is a well-known fact that most democratic systems of government are under a parliamentary head of state. A well known exception is the American-system, but it must, however, be borne in mind that the American-system is a federal system and that the American President, although directly elected with strong executive powers, is strictly bound by the federal system and the doctrine of separation of powers which is deeply embedded in the American Constitution. For instance, the American President cannot encroach on powers of the federal states and he cannot violate the independence of the judiciary. Also he has to obtain the ratification of his executive appointments, conclusion of international treaties and other important executive acts, such as the declaration of war and states of emergency in his senate. Therefore, to use or to apply the American-mode to Namibia with its strong unified character and systems of central government is, as far as we are concerned, totally inappropriate.

A parliament head of state who is mandated by a parliament becomes a symbol of unity and conciliation, since in the exercise of his executive powers he needs to follow the wishes of the representative of the people, and this democratic principle is in fact contained in article 1 (2) which states emphatically that all powers shall ultimately reside with the Namibian and not vest in one single person. It is an undeniable fact that the office of head of state should be rooted in democratic traditions of that particular state. In Namibia there is not one tradition that points to executive head of state with vast unchecked powers. Indeed, all systems of government in Namibia since the historical times point to systems of government under which the chief or rulers were always under the authority of the people. In no instance the history of Namibia shows the institution of a director.

For a Namibia head of state it is essential that both the interest of the people, as a represented by political parties, as well as the interest of regions is combined. For that reason it is proposed that the future Namibian head of state should be elected by the National assembly as well as a champion of the constitution and the laws. He should not be a party chief being elevated to the position of an autocrat, as the working document contemplates.

These are a few points that we wanted to make, and I hope that the one thing which comes through is the fact that we don't want just a ceremonial head of state. We don't want somebody who is just a figure-head - that is not what we are looking for. We want somebody who has power, but the power must ultimately rest with the people and not with the individual, and the one thing that we do not want; we don't want power to get rid of him. This reminds too much of what has happened too often in the world - that the only way is to get rid of the president. So, when you come and tell me all the ways and all the means that we can use to get rid of the president, frankly does not impress us. We need other ways to ensure that we need not to get rid of the president. We want to keep him there, but somehow we want to control him.

I will, for the time-being, conclude. We have in the meantime listened to Mr Ruppel. I want to say, I would have appreciated it more if Mr Ruppel would have reacted after having listened to us, because that is actually what you decided yesterday. Those were there instructions that you gave, we must come now and then after that, and I don't want to provoke you to call

me to order, but let me say this: I think the time has now come that we now consider appointing people to work for all of us, not only for some of us, and I am now blaming any party, because we are also now tempted to start drafting, and we might end up in a week's time again with seven drafts – one from your office, one from our office. Thank you.

Katjuongua: My approach is that I want endearing national, political institutions that can survive me, survive my political party and others; we can be passed over to generation to come. That is my approach. Therefore I think many of the constraints proposed here by my distinguished brother Mr Ruppel, which I think in a sense represent a degree of flexibility – I appreciated that – but I am only afraid of too many controls on the chief executive. I think somehow we must find out where to draw the line. But if we say at the time there is political instability in parliament, then the president must also stand up for election, I tell you the government might be overthrown every day by something or the other, maybe even an upheaval in the same political party. So, I just want us to be very careful not to tie the office of the head of state, whom I think should represent the dignity of our people, the unity of our people, the stability of our country. That is the way I look at it. Therefore I think we should be careful. We might that nobody might be interested in the office of head of state, because there is no comfort. The other thing, and I think we are here not to fool each other, at least I am not here to fool you, and if I talk straight, which I think is what I like in my life, because I think straight talk breaks no friendship, this is the only way I can be corrected if I am wrong, we must also face the realities of our situation, the composition of our population and the location of that population within the borders of our territory. What I am trying to avoid is that we should not have a Biafra one day here and succession and problems and so on. I am totally detribalized, nobody will ever blame me of tribalism, but I think I love this country. So therefore, I want my friends who are proponents of an executive president with extensive powers also to understand me very well that I also have sympathy for a brother or a sister who might land up in a useless office, because if you say the head of state represents the nation and the man in bogged dead by sitting in that house, then no Namibian would ever campaign for that office. I think we must work out the mechanisms how this can happen, and that of course is the powers of the president, his functions his relationship to parliament, his method of election, whether they should be elected by, as I proposed, a joint session of both houses of parliament and I want to be very frank with you people, that the role of the cabinet, the presidency, his powers position must be linked to the position that we will have on the question of a bi- or unicameral parliament. To me it is important, because also, as I talked about the diversity of our various factors, it also means that if you have two houses, whatever the numbers might be – I am for small numbers, because I believe small is beautiful, that they should not be elected in a similar manner, because that would be a duplication. So, if one is elected by way of proportional representation – and I must say it will be a mistake on the part of us here, even if I am talking different numbers in this country, it will be an injustice, unfair and stupid to try to control the numbers of your people in an artificial manner. You are going to create problems if people feel that they are Namibians, but their numbers don't count as equally as that of other people. I think we must take that into account and not make a mistake. Numbers must be given their full democratic chance of playing their parts. But I think if you say one house is elected by proportional representation, maybe in the election of the other house we can have a single member constituency method, so that maybe in that case the winner can take all, contribution to make." For me that is very important. So, the powers of the presidency, his functions, the constraints on him and if you say the president is elected directly, you might have a perceptual problem. Can be..... If he is directly elected by the people? In America and France he is elected by the people directly. He cannot be overthrown by parliament. In France he can be impeached by special tribunal for that purpose. So, we must also link the method of electing the President to his role in the system of government we are going to have. If you have an executive president, is there a need to have a Prime Minister? In France they have a prime ministers. Maybe one of you comrades or brothers wants to be a bureaucratic Prime Minister. But nevertheless, whether one should have a prime minister still or vice-president, I don't know.

In short, Mr Chairman, these are my ideas on the question of the presidency, the cabinet and parliament. I see them as a jackpot, so they must be dealt with in combination.

MR GURIRAB: We are at the point where the American were in 1776 in Philadelphia, where I spent quite a number of years trying to make sense out of my life. The issue we are discussing was before the Philadelphia Convention in 1776. The sentiments expressed here form some of the records of those discussions then. We have different heroes; we have different philosophical, political ideological preferences for different political systems. I don't think, for example, that – I was particularly addressing this to Mr Mudge – there was anything great about George Washington, the father of the American Nation. He was a slave-owner at the time when the constitution was being drafted. There is nothing great about that. He was among those who prosecuted and killed, massacred, carried out genocide against the Native Americans. I don't admire him as a man. He was not interested in free elections. The republic of United states was formed prior to the holding of elections. The American Constitution itself that was finally hammered out in Philadelphia had so many defects. Blacks were counted four-fifths of a man, they were of no consequences. Women were nothing, white or black. Women were not allowed to vote until 1929 in the United States. It took that nearly perfect constitution – I grant you that – amendments just this side of, to correct the deficiencies and injustices that it contained. There are wonderful things about the American system and about the American Constitution That I admire. I know quite a bit about it and I lived in that system so long that I know its defects, but I also know wonderful things about it.

Washington was as bad to me as Hitler and Iddi Amin. If you have mentioned Thomas Jefferson, I would have said the same thing too. My here of that period is Thomas Payne.

I would find it very difficult to disagree with the concerns expressed about the need to ensure in our constitution the doctrine of checks and balances, it is so basic so fundamental to me. How you do it is a different question. I have no argument about separation of powers and that is precisely what we intended to do in our draft and in the amplification. There is no argument that. How you bring about the way of institution formation, by way of other kind of legal and administrative arrangements made to bring about harmony between different national institutions, branches of government - that is the business that brings us here together. But I don't want to listen time and again that we need separation of powers – I am not saying we shouldn't talk about it – I was convinced about it more than two decades ago that there is a need for it. I, of course, endorse the attempts made by honourable comrade Ruppel share with the House how we, having listened Friday last and in subsequent consultation, tried to improve what we considered to be the committee working paper, no longer a SWAPO working paper, and it was that paper that we thought you would have in your hands last evening. I have since discovered that it did not reach all the leaders of the political parties represented here. It was an attempt precisely, because having listened to the discussion Friday; we found that there were some salient points, some fundamental points about separation of powers, checks and balances among the executive, the national Assembly and the judiciary. It was an attempt to improve our original submission. That is precisely what my colleague attempt to do. Those who had an opportunity to read through the revision we made, the paper we consider to be the committee working paper, will appreciate. In some instance I have a personal feeling that we probably went too far in some regards in prescribing the authority of the president. We differ philosophically, conceptionally and in terms of how our system should like. I believe that as we engage in this give and take, we will find harmony.

It is good to say that we should not be writing the constitution with ourselves in mind. That sounds also wonderful, but what we are doing is precisely that. The concerns, the preoccupations, the trepidations we feel are because of our own fixation to the present and the past. The matter of ethnicity, for example, heterogeneity of our society, Namibia is not unique in that sense. I don't not necessarily consider that to be a handicap so big that we have to, by different means, by verbiage, entrench what we have fought against for so long, precisely ethnicity and fragmentation of our population. If we think about what we are doing as an effort to ensure unity, meaningful national reconciliation, that, as I believe, the last few weeks since we met as members of the Constituent Assembly have not been weeks wasted, but were weeks during which we, in addition to the work that we collaborate on, got to know each other better, that I believe the more we are able to work together in the Constituent Assembly, in the government and various other institutions that we will create in this Country,

the more the ethnicity – and I appreciate the sense in which the honourable Katjiuongua said it, that he came back home and found friends across the board in this country, that I believe to be true, it will happen for all of us – so I do not believe therefore that there is an inherent danger in having large ethnic groups in one region of the country and to have medium sized ones in yet another part and to have smaller ones somewhere else, and that therefore inherently constitutes a basis for imminent danger for our republic. I do not believe that. I cannot really think of a country where you have an animal called parliamentary head of state. Parliamentary leaders perhaps like in UK, but parliamentary head of state is a concept that is quite strange to me. I don't know whether our ideas as SWAPO were inspired by the French model. It does sound like it, but I also believe that it has its own unique features that would set it apart from the French model. I would hate to see a situation emerge in this country that would be akin to what we have in Nigeria, the problem of Biafra and so on. That was a good reference point to underline the argument. I don't see it happening and we as leader should do everything possible to prevent it from happening here in our country. So, perhaps the honourable chairman, as we continue to listen to different contributors, will appreciate these things are interrelated, you cannot talk about the executive without at the same time thinking about the parliament and the judiciary. We started the discussion last Friday. Ours was an attempt, a sincere attempt to improve on what we had originally proposed, and I still believe that in spite of listening to two very substantive presentations, that we are very much far apart. If we are, then I hope there is enough goodwill and sense of imagination for us to remove those differences and work out a draft that would as much as possible enable us to reach consensus.

MR ANGULA: I just wanted to reflect a bit on the ideas which have been brought to the table in order to get a clear kind of picture. One is the idea of the parliamentary head of state which basically boils down that the head of state will be under control of the parliament, since he has to be elected by the parliament. My problem is that this idea seems to conflict with the democratic principles that the power is vested in the people themselves, the people of Namibia as a whole. If we have to take the power from the people and bring it to parliament, I am not quite sure whether we are doing justice to our own people, and I thought also that the unity of this country will actually come out of our own people. Parliament can contribute or can encourage their constituencies to have understanding for people in other constituencies and that sort of thing, but ultimately it is up to the people out there in the rural areas, on the farms, in the compounds, in the locations, in the beautiful townships to eventually decide where they want to be one nation and one people. So, I find therefore the idea of parliamentary head of state to seriously conflict with the basically needs in democracy, that power rests in the people, and I think it is from the position that we propose that the president shall be elected by nation-wide elections. In that way the people will be able to express themselves as a people. The other idea which has been brought about is the question of a chamber representing regions. I don't understand what this is supposed to achieve. The very people who are in the regions, and I don't know why they should be subjected to electing two types of animals one regional chamber, and why should it be central for the matter if it is within the region? A chamber representing the region should act within that region. It does not need to be central. So, I don't see the logic there. Perhaps the colleges in the DTA will be able to convince me on that, but I have serious problems.

We ask our people to elect a parliament, to seek a mandate from them. Then you say you have no confidence in the parliament, they should also elect regional something and this regional something has to become a central body. That is asking too much from our people and then having a president elected on universal suffrage and all that. In addition it is made more complicated by my good friend and comrade, President Katjiuongua, who says that these people who are representing the regions or second chamber should be elected on the basis of single member constituency, while the parliament is elected on proportional representation. My problem is that will not change the distribution of In our country. Certainly not. The same result you got for the election of members of parliament you will get when you come to the second chamber of parliament. That is one thing for sure.

Also I am surprised by the fact that while you are trying to foster unity – and I was very much encouraged by the proposal of our colleague in the DTA that in the preamble we must

emphasize reconciliation and unity – you must really mean it. Our people can only be united if they act as one, not as representatives for regions or tribal or ethnic groups. I do know that all these efforts are being suggested in order to strike some kind of balances in terms of checking and controlling the powers of the president. I am only trying to say, can't we consider some other means of doing that, than creating structures which will just not serve any purpose at all, which might even negate the very principles we are trying to enshrine in the constitution. I thought in this regard, my colleagues from SWAPO who were here last week and listened to your views, I think they even went too far to the constrain the power of the president, to the point that there are impeachment procedures that the president are impeached if he seems to be violating the constitution. That is very important. The second aspect of it is that certain decisions of the president can be overrules the president, that can create confusion in the running of the country. But I think these ideas have gone a long way to allay the fears that the president can become a runaway president.

We are concerned with the creation of the executive presidency, and I think the things that he came up with and which are stated in the working document, of course we are concerned with the powers of the president, and I am glad that the people are saying that we are concerned with the institution-making, we are creating institutions for ourselves now and for generations to come. The individuals who go in them are dispensable, they will go in and get out, and it goes without saying that if we elect a president, the automatic requirement of course, is impeachment and I don't like the way that some passing comments in checks and balances of the president were referred to as an unnecessary condition. It is absolutely necessary, because it goes with the same methods that you bring about an elected officer into an office. There should be provision, a constitutional provision that would be allowed to remove the same elected official.

About four areas are mentioned where both disagreement and questions of the methods have been referred to: the method in which the president is elected, the powers of the president, functions of the president and tenure of the president. I have also looked at the DTA-proposal, I had it here, and I think we should allay some of the fears by saying that the functions of the president with regards appoint of minister - that is given as a conventional function. So, I don't think that we are going to be arguing about that. But I think Mr Mudge did make a specific reference to the elected members outside by the president. I think that is an issue which should be brought in and be and be given the justification that it deserves, or the background that brought it into the proposal that is submitted as the working document. I think that is the pros and cons, we can discuss that. The thinking behind this, of course, is that a functional president would have to have some responsibilities and some individuals to work with other than the given, and the number6, I think there is nothing sacrosanct about 6, but 6 again talk about democracy. It should be looked into in terms of does it encroaches or does it negate the whole principle of the elected president. Does it tilt the balance in such a way that it negates the powers and functions and responsibilities of those who were elected, who have the mandate of the people? That is a question, w shall debate that, and I think the appointed members should be seen in that light.

Again, powers of the president, as we see them here, Comrade Ruppel attempted of course to bring the necessary checks and balances. I do not know whether there was an overreaction to those checks and balances, but I think there are. They go hand in hand with an elected president.

STANDING COMMITTEE ON STANDIG RULES AND ORDER INTERNAL
ARRANGEMENTS

WINDHOEK
15 DECEMBER 1989

MR HAMUTENYA: Mr Chairman, I think this point is true, it is contained in the working document, but to be frank, it was also a bone of contention within the SWAPO-caucus itself before. Some tried to justify on the grounds that you may have a situation whereby the president is required to nominate his cabinet or to choose his cabinet from among the members of the National Assembly. In those instances the president should have the possibility to bring in some people of particular skills and experiences, or maybe for example businessman who does not want to go through the rigours of an election campaign, but is prepared to serve the nation. So far, so good, it sounded well, but since the working documents does not propose that the Cabinet should be only selected from the National Assembly, the argument did not really hold water for the appointment of the six people. So, I think it is something we can do without. We have strong position on this.

MR RUKORO: I have a problem with conceptionalising the type of, or in what way the presidential power to appoint x-number of people to the National assembly, how that could be characterised as being contrary to democratic principles. If that can be done with you changing the balance of power within the Assembly, and at the same time serve a paramount national interest, like for instance the representation of distinct interest groups in this country, whether we talk of organized labour, whether we talk of organized commerce, or for instance, as I proposed in the House in my submission, the representation of traditional leaders. These are hopefully non-party political interests and concerns, they are of vital interest to all of us, and provided the president, acting on the advice of the cabinet, can make appropriate appointments of these people to the national assembly so that we can benefit from their direct input in terms of policy formulation, without themselves having the right to vote when it comes to the vote. That does not affect the balance of forces in the house and therefore I can only see it as really adding to the strength of the functional democracy, rather than running counter to the democratic principles. I would really urge reconsideration of retaining that principle.

MR PRETORIOUS: If the president is acting in consultation with the cabinet and if we can keep in mind the idea of proportional basis and if it is without the right vote, I do not have very strong feelings about it. It can stay as it is.

To prefer a number of individuals. I think the example that honourable Hamutenya gave, it could be very competent business but who does want to go through the rigours of elections, knowing very well that he may not have a constituency to be elected, but in terms of skills and competences that he or she may have, would be noted nationwide that - that should be the person in a given field. So, I think this is basically designed to meet those kinds of objectives in terms of spreading the skills, the competence without tilting the democratic balance of the elected representatives. But the objectives are on a competent basis. Then, of course, we are saying that the people would be in the assembly with or without a vote. That is the criterion, I think.

MR MUDGE: I just want to make sure that I understood the honourable member Mr Hamutenya correctly, that he has no serious objections if we scrap this provision, because we from our side feel strongly that it goes against the principle of democracy if you are appoint people in your legislative body. I am not talking about the cabinet now I am not talking about executives, I talking about the legislative body and I just want to get clarity. I have listened to Mr Katjiuongua's proposal. It might be somehow a remedy if we do it on proportional basis, but I think it is too early for me to concede to that. I think at this stage to me it still a principle, but the reason why I think I asked for the floor is just to make sure did I understand Mr Hamutenya correctly. Let us just get absolute clarity on what he infect said, otherwise I might be a little confused.

MR RUPPEL: Two points: I think the honourable comrade Hamutenya made it clear that SWAPO is indeed prepared to be flexible on this point in the atmosphere of being eager to get on with the job and look at problems. What Mr Hamutenya said was, as I understand it, correctly understood by the honourable Mr Mudge, and I associate myself with the things said by Mr Hamutenya. I think want to point out to the DTA who raised this point as a serious principle problem, because of the undemocratic nature of it: It is quite clear that as matters are now there is provision made for the direct popular election of the president. He would be elected on his own tickets as it where. To implement as executive his policy he should, as part of his democratic mandate, also have a bit of clout and it is only good democratic principle if that is shown in the way which was envisaged originally by giving him the power to appoint another six persons who could usefully participate and enrich the proceedings in the legislature and also constitute a very useful contact point between executive and the legislature. So, it is not entirely undemocratic. There is an election, the people that they vote for the President plus six, so it is not something that is radically undemocratic in the end if you consider all these matters. But as I have said it is a flexible thing and I make a note of Mr. Mudge's cautious note that if it is done on a proportional basis, this principle - that it could be used meaningfully in another context later on.

MR HAMUTENYA: For me the problem is not so much about the democratic nature of this exercise. My problem is criteria of choosing these six. I foresee problems down the road in any attempt to appoint these six individuals. I have listened to the various criteria advanced here, but I still foresee problems. If it is a question of proportion, what does it change? It will still leave the question the same. If we need more people, why don't we increase the number of the assembly from 72 to 78, then you solve the problem. If the number of the seats in the Assembly is the problem. Proportionality will simply get us back to where we are in the terms of the balance of forces in terms of parties. I cannot see very objective criteria which will be acceptable for all of us here to appoint the six people I have a problem with this clause myself. If it was left to me I would do without it.

MR MUDGE: That is why I was surprised, because normally he is talking in his own interest. But in any case, if you feel that there is a great deal of consensus on this matter and that it might be influenced either way, depending on what we are going to decide later, then I will agree that we move on.

CHAIRMAN: There is an agreement and the same principle is about co-opting people from heaven to come and sit here. Because of their expertise we want to bring in lawyers to sit in here to help us. It is the same principle. It doesn't derogate from our democratic right. So, there seems to be agreement. If it is controversial, we can discuss it but the majority favours that it be included.

"Where a bill is passed by a majority of two-thirds or more of the members of the National Assembly, the president shall be obliged to give his assent thereto. So, he has no choice. The next point says in subparagraphs (3) and (4) of that annexure, which is point 10 of the covering note: "Where any bill is passed by a majority of members of the National Assembly, but such majority consist of less than two-thirds of the members of the National Assembly, and the president declines to give his assent to such bill, he shall communicate such dissent to the National Assembly". And then we go on to subparagraph (4): Should the National Assembly thereafter elect to repass the same bill and the president again either declines to or fails to assent thereto with a period of 30 days, the National Assembly shall, from the expiry of the side period of 30 days, be deemed to have dissolved, notwithstanding the fact that its ordinary period of duration has not expired." This proposal says that the president also will have to resign within a certain time and he will have to call elections for both a new legislature and a new president. That is how this constitutional deadlock is taken care of.

MR KATJIOUNGUA: I have two questions. I want clarity from honourable Mr Ruppel, what is this requirement in 4.9 and 4.10, whether it is a control on the executive power or whether it is a control on the president's capacity for law-making powers. The other is, this requirement of an election every time the president vetoes legislation

MR RUKORO: I have a few problems with this provision as well, and I think it can be resolved by a redrafting or reformulation. For instance, I feel that we should state in simple terms that all legislation can be passed by a simple majority. Full stop. This is the case in all other

societies. Secondly, we must state also in simple terms that there will be no presidential veto of legislation passed by the house, except in one circumstance only, namely when the proposed bill is unconstitutional in the opinion of the president, unconstitutional in the sense that it violates or a provision thereof violates provisions of the bill of rights or is repugnant to one or other provisions of the constitution itself, even though it is not part of the bill of rights. It is the only ground for a presidential veto, and once the president has exercised that veto in those circumstances, then the matter should be referred to the constitutional court for the resolution for a final decision: "Yes, the president is right", in which case the bill will lapse, "the president is not right", in which case he must sign and it will become law, pure and simple. I have a problem with the provision that allows the president to dissolve parliament in case there is a dispute between himself as president and the House. Ordinarily my understanding is that that provision whereby the president can dissolve parliament, that authority of power is given him, not to resolve the conflict between himself and the parliament, but usually is given to him in order to resolve the deadlock between two houses of parliament. So, he comes in as the third check or a non-legislative participant in the process of law making. If the senate and the National Assembly are at loggerheads about a particular bill, and it is becoming a crisis nationally, that is when the president comes in, using his power to dissolve both houses. But I have never heard of a situation where in a dispute involving the president himself and the house, he can dissolve the house. That is a potential for blackmail and it is therefore politically unhealthy. That is why really feel that the only ground for a presidential veto should be that in defence of legally, i.e. the proposed bill in unconstitutional. Otherwise any measure passed by parliament, ordinary law-making by way of simple majority, he must sign, except those that require specifically two-thirds as is provided for in the constitution itself. What is important to us is, what action can he take should he not be prepared to sign the law? Dissolving the government, to my mind, is not the solution. Refer it back, yes, that is the normal procedure. That will also have to be the procedure to be followed by the Senate. Refer it back a second time.

Mudge: That is why we have a serious problem, and I think if we can now discuss, now or at a later stage, only about what would be the action that he can take, and that it should not necessarily be anything that would lead to the dissolution of the government. I just wanted to make that point. I wish somebody could help me with the formulation. Mr Rukoro said a house of revision, was that the word? Court of revision. Can we say that in this case the president is the judge of revision, and we can't get away from that whatever we do?

MR RUKORO: I think the solution is in the document itself. The only thing we have to do is to cut off that power which says the president can dissolve parliament. Otherwise it is the same thing as the American thing. You pass it by a simple majority, the president vetoes it, the house repasses it with a two-thirds majority, the president is forced to sign, but there will be no dissolution.

CHAIRMAN: Thank you very much for solving the problem.

DR TJIRIANGE: What if it goes back and comes back without a two thirds-majority? Then it has elapsed?

MR RUKORO: Then it lapses, the presidential veto is sustained.

MR MUDGE: MR Chairman, it is not possible for our delegation here to finally make a proposal, we have to discuss it with our caucus, but the feeling among us here is that we might agree to amend our proposals in so far as the position of the prime minister is concerned. We make provision for a cabinet with the prime minister as the chairman of the cabinet. In your case the president will preside the meetings of the cabinet. We do not have authority to as this point in time make concession there, but we have the feeling that there we might be able to make a concession. The main difference, I would say between our proposals and the working document, A.1, is the fact that we make provision for the prime minister and a cabinet which will have to be approved by parliament. It will not be in the sole discretion of the president to appoint the prime minister and the members of the cabinet. It will not be in his sole discretion, it will have to be approved by parliament. In other words, that will have to discuss and secondly, we make provision or we qualify the powers of the president by bringing in the word "on instruction". It could also be "on advice". That will not really make any difference, it is the same thing. We just have to keep that in mind.

CHAIRMAN: We have different perception of what executive office entails. On the other hand there is also the question of confusion or maybe leaning towards certain cases where there is a coalition government, where I am forced to co-opt other parties, but if you have a clear-cut majority like in the UK, and you can appoint the cabinet, people to help you to run the country, then I have never seen that you have to go and get permission for that. But on the other hand, if we are going to talk about where there is no absolute majority, where you have to co-opt and so on, it is slightly a different matter.

MR RUKORO: I wanted to resolve it in a slightly different way. The president may dissolve the National Assembly in, instead of three, we say two ways. The first one is acting soloist, article 34(2) (a). My understanding of that is that he can do so in two ways. The first one is, for instance, to specify so that there can be no loopholes for abuse, that the president can resort to this power in order to resolve a major constitutional crisis which materially affects the ability of the government to govern effectively. It is deliberately phrased in a general way because we cannot foresee all the types of constitutional crises that may come up. That will exclude this thing whereby he can dissolve because it is a good year for him. Secondly, I think the president can act under this power for the ordinary dissolution of parliament after four, five years when the term of tenure is up. That is the only possibility for him to act under this article. The second and final authority under article 48(4) is stipulated in the DTA-draft, is what we talked about earlier on, namely the vote of no-confidence by parliament and the prime minister advises president accordingly.

CHAIRMAN: I think that is a solution. There is a proposal that we take that.

MR BIWA: If we really want to make the judiciary independent, I would suggest that we allow the president to nominate a judge, and this nomination should be done in consultation with the relevant bodies, the judicial Service Committee, and this must be subjected to the approval of parliament by a two-thirds majority. The reason why I am suggesting that this be done by a two-thirds majority. The reason why I am suggesting that this be done by a two-thirds majority in parliament, and if we make it only approval by a simple majority, then that judge could be a favourite of one single party. Therefore we must make it by two-thirds majority. Only then we can guarantee that man is really independent.

CHAIRMAN: Yes. About honourable Biwa's concern, I think we shouldn't think about our own current situation only. We should also think of prosperity. Maybe another way is also to determine how long they are going to be appointed for that they have security. Is it for life, for so many years, so that they know?

MR KATJIOUONGUA: For life they have got to be independent, so that they know they might be removed.

DR TJITENDERO: I agree in principle with a life appointment of the judges and people in the court, however, I was going to make a proviso that for the first group of the who would be appointed, because we are all new, that there be a term, x-number of years, and upon conclusion of that, in case we find some, that there will be necessary and legitimate changes at a cycle of five years, the same time as the Assembly and thereafter life appointments for the supreme court judges.

MR RUKORO: I differ a bit from my honourable comrade here. I think if you do not want to send the wrong signal at the wrong time to some important quarters of our population, then you will not talk about appointing judges for x-period of time, and have some kind of court to review this things and stuff like that. I think what you need really here is to make appointments on merit and the merit, of course, will be the subject matter of the confirmation hearing, and having made the appointments, make them for life. The only grant for removal is incompetence. The man or woman has become incompetence or is guilty of gross misconduct. These are accepted nations for removing judge, and I think that is what we should really agree to and not have trail period within which people will be vetted, because one can understand that ideologically, given our situation, we may run in too many problems.

MR BARNES: I was listening again to my honourable colleague Mr Angula. Before replying to his teacher's life, I would like to make mention of the following: Normally the same way a person is appointed, the same way he can be removed and to maintain the independence of the judiciary, a trail period would not be the answer to the problem, because the trail period

he would act so favourably to the person that appointed him, that he will pass the test and that test needs not to be that he is independent. It will influence his independent judgment.

DR KATJIVIVI: I am a bit worried about the way we are dealing with an important issue here. We are going to inherit judges who have been operating in this country, and I was just wondering whether there is a lesson to be learnt in terms of inheriting judges who might be seen as operating under conditions whereby they might have been deemed to be...

MR BARNES: Brainwashed?

MR RUPPEL: On the wrong side of the struggle.

DR KATJIVIVI: Not only on the wrong side of the struggle, but are men who are bit older, but who have been allowed to continue indefinitely. These are the kind of things we need to reflect on so that we begin a clean slate, so that we do not have an individual who is perhaps redundant for various reasons.

MR BARNES: Act in consultation with, subsection (4), "act on advice of the cabinet." There is no other option. In accordance with the principle of the executive presidency, the president – and I think we have to in all sincerity think not in terms of the negative experiences from Africa and Third World – the principle in an executive head and I think if we go to the extent of saying "on the advice of", as opposed to "in consultation with", I don't know what we are doing to ourselves and the future institutions here. I strongly and very humbly oppose. I would think that "consultation with" is an executive, practical, conventional decision making procedure. I don't think, because we are bound by our negative experiences; take stereotypic examples from negative quarters. I think we have to be very frank, we are not making this for ourselves, quite obviously, and I also want to say that when we are making these decisions, we must know that we are not even in the position in which our comrades were in Zimbabwe, where our colleagues from Zimbabwe were pointing to Lancaster House. This is a historic opportunity we have been given as Namibians to write this constitution ourselves, either to mess it up to take in to account our actions that we are taking today, and I am inclined to think that we are thinking too much of the immediate environment. "In consultation with" is appropriate.

MR BARNES: We feel that it is important that the president should act on the advice of his cabinet, because "in consultation" doesn't give a clear direction of cabinet which could promote cabinet-harmony, and also it is in line with the checks and balances that we said we said was important for the good government function. So, the "in consultation with", I would strike a balance and say the following: "In consultation with and on the advice of", if that could solve the problem.

MR RUPPEL: Yes, I think the more crucial one, and we are getting bogged down on some technicality, the principle is stated in paragraph (2) which is clearly stating the joint exercise. It says: "The executive power vests in the Cabinet headed by the president", and whether you say here at the bottom "in consultation with and on advise" doesn't make a big difference, because the executive function of the government vests in the cabinet headed by the president. So it is really splitting hairs, it is not going to make a difference at all.

MR KATJIONGUA: I tend to agree with Dr Tjitendero here we shouldn't make our president look like a puppet. I think the word "obliged to in consultation" is important. It looks like he is going to take decision after consulting. When you are obliged to somebody, it means you must take their advice, and if you say "advice" it is not is not good for his dignity.

MR RUPPEL: So, we leave it like it is.

CHAIRMAN: "Except as maybe otherwise provided by law, the president shall, in the exercise of his functions, be obliged to act in consultation with the members of the Cabinet."

MR BIWA: For the sake of record I would also like to say the following: I would have liked to have an explicit requirement that the president is advised by the cabinet and he is obliged to follow that advice. Now, as it stands here he is obliged to consult, but he is not obliged to follow that advice. He is merely obliged to inform on his actions and he has the right to proceed with that action, even if that action is not approved by the cabinet, still he will remain within the frame work of the constitution does not say that he must be advised and should take that advice. It only says that he is obliged to consult. He can consult and proceed.

MR KATJIOUNGUA: It is proposed that the president is elected by the legislature by way of a simple majority and that the president should not hold office for more than two periods in office, all in all ten years.

MR RUPPEL: I think we should look at this. The president and his cabinet should go together because they work together. I think it is not good to have a five year life of a parliament and a six year life for a president.

MR MUDGE: We will make this far reaching concession. Don't tell us that we are unreasonable.

CHAIRMAN: That is not agreed. The debate is still open on that one, and I really hope you will make a far-reaching concession on that one. The other one reads that he will be elected directly, not by parliament. There is a suggestion that it must be by the legislature by simple majority, by honourable Katjuongua. Any objections to his amendment? Is it accepted?

MR GURIRAB: Yes, some of it, some of it not. The suggestion by election by parliament obviously should not be acceptable, but the tenure of office is acceptable. I would like to be informed as to what the disadvantages are of a president who is directly elected, which is a position that I strongly support. Therefore, in conclusion, I want to stick to the position that the president must be directly elected by the populace, leaving the doors open for convincing arguments for a president who is elected by parliament.

MR HAMUTENYA: I would like to go back to my position of yesterday and tell a bit more. I do have a problem. I believe very firmly in the notion of separation of powers and for that reason I seriously have problems to agree to the proposition that the president should be elected by the legislature, whether it is single chamber or bicameral, because once you have done that you cannot talk about the president as being on par in terms of power-sharing with the legislature anymore, because he is an appointee of the legislature. That is my basic problem. If you say fine, you don't want a president who is directly elected by the whole nation, I would still propose the other alternative, elected by the whole nation, I would still propose the other alternative, you simply have to accept that you are going to have him from the majority party or from a coalition of parties which agreed to it together. That way still makes him a president and not just a figure-head, because the problem of figure-head, is what we are trying to avoid. We want a genuine balance of checks and balances or division of power. So, for that reason I am still saying that we had examples in South Africa here. The President of South Africa is president by virtue of being the leader of the majority party that won the election. I said yesterday if you look at the parliamentary democracies, Great Britain, Australia, New Zealand, India, Canada, their executive powers actually reside with the prime ministers and he comes into the position by virtue of being the leader of the majority party. So therefore I am saying we have two options here and as far as I am concerned these are the only options, either you take it that he becomes the president whoever leads the majority party, or you say he be elected by the electorate of the nation. I am not so strong insisting that he should be elected nation-wide. I will accept it if he is the leader of the majority party, but I have serious problems to have him elected by parliament.

MR KATJIOUNGUA: I think now we are coming closer to the problem raised by Mr Pretorius, because if the president is actually the leader of the majority party and the term of office of the president, the national parliament, concur, then it essence it means, and if the president also is elected by parliament, it simply means that when his party no longer enjoys the majority in parliament, he cannot be elected. I think it follows very clearly. Then, if we have the president elected directly, then we must also look into the question of either the president being allowed to appoint his own cabinet which might not necessarily be members of parliament, or otherwise, as they do in France, you may have the situation where the prime minister, who would be appointed by the president, does not come from the party of the president. There you have a division of power just like we had with Francois Mitterrand and..... in be the leader of the majority party in parliament, then the president may have to appoint a prime minister from a party that is not his own. Then it must mean, like in France, he cannot appoint another cabinet must be the cabinet of the opposition party that is there. That is the way it works, he cannot do anything else. If we are going to have a president elected separately, then I think the point by Mr Mudge also comes up, that right now after we have finished this constitution, we are going to have another election to elect the president. If

he is not elected by the legislature, if he is elected separately, then the implication is that we must have another election now to elect the president. So, if we follow the method that we talked about before, that the president is elected by the Assembly and this time it happens to coincide that the majority party and the president come from the same party, then this is a very smooth thing to say he must be elected by the legislature, of which right now the majority is SWAPO. So, it is very easy this time. But if we are writing this constitution forever then we must be careful to say we want the constitution and independence ready by the middle of January and to say the president must be elected directly I think those are the implications.

MR STABY: My mind is orientated at some practical issues with regard to the president by the people directly. First of all it would appear to me that if he does receive his mandate directly from the people, then he is responsible to the people directly. So, the first question that I have is: what is the point of including in our suggestion here the machinery for the removal of the president from office? If the president is responsible to the people, then the legislature cannot interfere, can it? That seems to me to be the logic of it. If the president is responsible directly, having been elected by the people directly, what machinery does exist in order to enable the people to impeach him, other than the normal party-political process? I am looking for answers.

MR BIWA: Mr Chairman, I am opposed to the direct election of the president, or I was opposed. When entered this chamber for the first time until this afternoon I was opposed to the election of the president directly. But after we have built in checks and balances, which I think would effectively, my mind has changed somewhat. The main reason why I opposed to the direct election of the president is because I don't believe that a president, directly elected by the electorate, can be controlled by the parliament. There is a serious need that the parliament must be controlled by the cabinet and the legislature. But after we have agreed on a number of checks and balances intended to keep the president in check, I can agree to the direct election of the president, provided I am assured that these checks and balances can keep the president in check although he is directly elected. Thank you.

The question by Mr Hamutenya or his conception of the separation of powers, I think we must agree that there are different versions about the separation of powers. We have the American system about the separation of powers. The cabinet-system they have in Britain is one system about the separation of powers, in the sense that when you have executive government in that sense, you have an overlapping sort of powers between the legislature and the majority party. The same thing can apply to France. I think here in Namibia we are trying to find also our own version how separation of powers can look like, and I think we have a duty to look more innovative.

MR KATJIONGUA: No, the system works this way – I think we have been discussing it from yesterday and we seem to be getting nowhere. The fact of the matter is that by election he is the leader of the majority party, but even if he alone had 50%, still he must be approved by parliament to become chancellor.

MR KATJIONGUA: All I am saying is that we must have clarity about the method in which we elect our president - that is all. The situation we face now, is let's agree now, let's not argue anymore, that this parliament is going to elect the president of the majority party to be the president of Namibia. I think the rest of the sorry won't help us too much. If you put a provision in that after five years the president will be elected by direct vote, that is a different matter, then I think you must look in to that, because directly elected ipso facto means the president of the majority party and then we are talking about the same thing.

The reality is that we are going to elect in this parliament within the next month or so the president of the majority party to become the president of Namibia, elected by this parliament by a simple majority.

MR RUKORO: The final decision this morning was, and I almost recorded the Chairman verbatim, when he concluded the discussion he said "the majority favours acceptance, that is clear, but the whole question will be finalized later in view of Mr. Mudge's opposition to the idea of the nominated members." So it was deferred.

DR TJITENDERO: I propose that it be retained.

MR MUDGE: I want to record my vote against that for the simple reason, I just want to be clear on this one, not because I want to be difficult, but as you will remember, in our party's presentation in the Assembly we made it very clear even at that stage – and we were not even referring to your proposals – that we cannot accept, on principle grounds cannot accept appointed members to an elected body. I just want to record that.

MR MUDGE: Who did that?

MR RUKORO: I thought you supported it.

MR MUDGE: No, I rejected it entirely and completely.

MR RUKORO: My problem is, there are people out there who has certain expertise, especially in organized commerce and so on, who can make some sense in this house.

MR MUDGE: And then must become candidates?

MR RUKORO: But the problem is that because we have that expertise, they are not good with politics, generally. How we are going to affect the balance in this House if they don't have the right to vote? Their only contribution is to bring their expertise to the benefit of the nation and the president is not going to appoint them because they belong to the ruling party. That is why I really urge you in the national interest, MR to simply let this provision remain.

KATJIOUNGUA: I am just wondering how the minority has become the majority all of a sudden, Mr Mudge and Mr Hamutenya, because we agreed this morning. I think we should retain this provision, as my colleague has just explained and on the basis of proportionality. I will have the choice, if I am alone, together with bigger numbers in the national interest.

I think it will be an insult to 72 members, elected members in this House to go and look for a talent outside, to say we are not good enough, we don't have the expertise, we have to bring in somebody from outside who was not prepared to stand the democratic test.

CHAIRMAN: The chairman's view is that technically none of us were elected, the parties were elected and the parties listed us, and some talents were even left out because they were no 72. It is a question of principle here. The majority seems to want retention. We must be democratic in our outlook.

STANDING COMMITTEE ON STANDING RULES AND ORDERS AND INTERNAL
ARRANGEMENTS (CONSTITUTIONAL MATTERS)

WINDHOEK

18 JANUARY 1990

MR PRETORIUS: On a point of order, I just want to ask in general, what is the possibility for our legal advisors to sit in, to save time?

MR RUPPEL: I think we should not have any legal advisors or any other teams here. It will just delay the discussions. We have very competent legal advisors here, and I think preparations between the parties and their legal advisors should have been concluded before they came in. That was the basis on which we working until now and seems to be successful until now.

MR BARNES: I view this request in this light: If there is any way that any contribution can be made to assist any delegation to perhaps expedite the deliberations by his legal advisor being afforded observer status at this meeting I think that it could be to the advantage of us finishing this constitution possibly much faster than what we are doing now. There is the problem that delegations, after they have deliberated here for the day, have to go back to their legal advisors, discuss the whole process, even at times when we have to make a concession or something that we did not have the time to review. Your legal advisor, within striking distance, is not participating in any of the deliberations, it is only observer status he has and it is my considered opinion that it could be an advantage to speed up matters and we are all at times guilty that we are not going fast as we want to go without making a bad job of the responsibility. I would ask for favourable consideration, because the legal advisors are not going to participate, it affords the delegation opportunity to be in contact with his legal advisor and it will expedite the deliberation and we won't be losing anything, because whatever is discussed here is taken over to your legal advisor, because there is the confidentiality between the legal advisor and the caucus. I would ask for favourable consideration.

MR ANGULA: I thought this issue was kind of closed. I do sympathize with the situation of ACN in the sense that they don't have somebody amongst the heavenly lawyers. But for the other parties, I do believe we have and I thought wisely – decided that we should take legal advisors who will be above our political programmes, who will be neutral and whose advise we should take in good faith, because they are not defending a particular political view point. If we are saying that the learned gentlemen we have asked to assist us in this task are not doing their job properly, then that is a different thing. Once we bring in our personal lawyers here, the lawyers we are paying ourselves, they are there to defend our positions. We will have arguments first among ourselves as politicians, after that the argument will shift to the lawyers and I don't know how far we are going to go. I would like to take note that those issues we failed to resolve, we didn't fail to resolve them because of lack of legal advice. It is basically because of the political nature of those issues. Then we can go to the legal opinion. Personally I am satisfied with the kind of advice we have been receiving from our learned colleagues whom we have resided to retain here in Windhoek. What we have to do as political leaders is to have political courage and political will to make decisions on those issues which are of a problematic nature. The interpretation in law could be provided to us by our heavenly lawyers. That will help us to make progress.

MR GURIRAB: Mr Chairman, honourable Comrade Nahas has partly stated my case. I beg to differ with the idea of bringing in party lawyers in this committee. Lawyers are among my best friends, I myself being a Sotho-lawyer. If there are problematic areas, they do not require legal minds; they require political wisdom and courage of us as the substantive drafters of the constitution. We have made tremendous progress; I am certainly not dispirited in any way whatsoever by the snail-pace that we are now deploying. We just want to be absolutely certain that the words reflected on the papers, the decision we take are as much as possible final decision, so that we don't come back to them. The very fact that we have decided collectively to bring in there distinguished lawyers to participate in this committee work is a step in the right direction. But we need to flood this committee with additional lawyers who are basically our political extensions. I would very much therefore like the committee to continue with the business of going over the paper.

MR PRETORIOS: I don't want the house to be divided, so if there is no consensus I withdraw my request.

MR PRETORIOS: We discussed the problem and is in the case of executive power where we are prepared to settle if the executive power is in the president in consultation with his cabinet and he should not necessarily be a member of the cabinet, we are also prepared to accept the idea of a president elected by the people. But it all depends now on the detail and that is why I am so serious to have legal opinion there. So, if we can settle as far as his functions are concerned, we are prepared to accept the idea that the president is not a member of the parliament as such; he can be elected by the people outside. But then it is very important to us, the whole question of impeaching, etc.

DR TJITENDERO: I sit here and try to imagine the part that we are now to undertake. I venture to say, would it be helpful to us and the discussions if we draw a distinction, for the sake of clarity, that we say let's first address ourselves to the transitional provisions, because we have two issues that are not related but ought not to be discussed in the same function. First the given. The given is the present structure, and then maybe if we reach an agreement on that, which is transitional, then we can go on with the subsequent more standing and continuous constitutional provision. I was just trying to see whether we could make that distinction. If we could make that distinction it will be clearer, because we can discuss that and then proceed.

MR PRETORIOS: Just for clarity on that, otherwise all the members will now talk about it. I am talking about the eventual position now. For the transitional position we think there must be an electoral college. It cannot be the National Assembly, because the National Assembly also consists of the six members, although they have no vote. So there must be a defined electoral college.

MR STABY: I think we ought to bear in mind, I have no problem with the suggestion, that the only difference between the transitional and the ultimate, final situation concerning the president is the question of electing him. That is the only difference. The functions and the powers of the president ought to be the same in the transitional period and the final period. Therefore I would suggest that we deal with the functions and powers of the president and leave aside – in compliance with Dr Tjitendero request – the question of election. Afterwards, having settled the powers and responsibilities of the president, the question of elections can be dealt with relatively easily as far as the first phase is concerned. The second phase is different story. But the key of the whole thing is his power, the checks and balances.

MR KATJOUNGUA: Mr Chairman, I had an opportunity to reflect over this matter since we left here last night, and as far as possible to consult with my colleagues by hotline – whatever it means – and our feeling is simply the following I hope all of us will talk straight on these things: Firstly, we hope all of us will agree, establish totally, unambiguously, that we agreed up to the 19th about what stands in the report by the rapporteur as well as which was used as the basis by the lawyers to draft the constitution as it stands, that there was agreement to that effect. There is no ambiguity about it. Why I am saying so is that if we use that as a point of departure and then we want to change what we agreed upon, we must proceed from the proposition that we agreed on what the position was, because that is important for me. Point number two: We only have two oppositions in reality. One is to keep to the agreement that we made, that we talked about yesterday and we see how we go about to independence and, if possible, to the next five years. But then I think in considering whatever option, we must strictly keep ourselves within the ambit, the parameters of the 1982 Principles, and they say certain definite things and I will never agree to any deviation from those fundamental principles, because then I will be doing totally illegal. That is option one, we stick to that agreement to see how we handle it as we go forward, or if we change them we must say do and open a new debate with possibly agreements, new package understandings and things like that, around that particular agreement. In its present form it has certain problems and we must agree to change it and then we see how we handle it by having a debate on how do we handle that agreement. The second option is simply that we write a constitution and stop there. The constitution, as the principle says, Section 3, will determine the organization and powers of all levels of government. Then we simply do that in the constitution and then call for national election. Then one we had was simply to elect an assembly to write a constitution and then we finish that task and put a full stop, period, and have another national election to elect all the levels of government, or to elect the president, the parliament, the regional

and municipal councils in one election, not separate elections, on the clear understanding that the masses, the people be told that now we only agreed to write a constitution but the other matters will be taken to the people for discussion. I don't think we have any other options. Otherwise we will be sitting here waiting time. I know I fared very badly in the election, but I think when matters of this nature is at stake, there is no choice but to go to the people to decide the future of this country in a democratic order. That is where I stand.

MR KATJIONGUA: The agreement is that the first president for the five years will be elected by parliament; he will be a member of parliament or will sit in parliament. This is what we agreed in these papers, that is the understanding of myself and if I am wrong you can tell me. I don't think we talked about the possibility of finding somebody else from outside parliament to elect him. If you want to change that you can do so. And then everything that stands in this paper here is, I think, the basis of what we have agreed upon, the powers of the president and the rest of the story.

CHAIRMAN: It is true, agreement was reached, but Mr Mudge spoke about the practical situation. He said: "For practical reasons we have agreed for the first five years. Five years. Let us face it that unless we want to score points and I think we have passed that stage..." and he went on.

MR KATJIONGUA: How does that differ from what I am saying?

CHAIRMAN: I deliberately asked what the agreement is. We seem to have misunderstanding that is why we are wasting time.

MR KATJIONGUA: No, I am not wasting time. Mr Chairman, don't say I am wasting time.

CHAIRMAN: I said "we". The chairman has the right to put the decision here. I asked what has been agreed upon, whether we all understand one another. I don't know whether we understand the agreement and it says that for practical reasons the first president will be elected by the legislature and that we are going to convert this constituent Assembly into the National Assembly - that the president will sit in the Assembly. Do I summarise it properly?

MR ANGULA: I don't remember a discussion about whether the president should be part of the National Assembly. I don't remember it. You will remember that we adjourned I did actually state the same position that my understanding is that we don't have a problem with the election of the first president. The only thing we have to decide upon is whether this president should be part of the National Assembly, and then I said that in my view that would be contrary to what Mr Mudge was saying the other day, that the president must be guardian of the doctrine of separation powers. We have to separate powers. That is what I said. So, I don't remember at this stage that we talked about whether the president must be part of the National Assembly, but the election yes.

MR MUDGE: I must guard against being quoted incorrectly, it has happened before and I don't want it to happen again. You have the minutes there, you read them yesterday and there could be no doubt whatsoever that what I suggested is that at least we have agreed that this body will become the government for the first five. As far as the president is concerned, I pointed out that it of no practical significance right now, whatever the position might be in the future, the first president will be elected by parliament and that because of that practical situation, we must provide in the constitution that the president will be elected by parliament, not as a temporary measure, as a provision in the constitution, and I said if during the five years we come to the conclusion that this is not really what we want, then we can amend the constitution by two-thirds majority. I think I made it abundantly clear that I did not suggest that this must be a temporary measure. If it works it can stay like that. I don't have the minutes here, but you have them there, and I remember that somebody suggested that it must be a temporary measure and I asked "why temporary?" Can I just have a copy of the minutes and I can read it to you. So, as far as I am concerned, we have decided that the president will be elected by parliament. There is no doubt about that. We can change it. I said yesterday if you think it is necessary, if you give good enough reasons we can reconsider the position, but I think the instructions, the briefing by our lawyers, Mr Ruppel and Mr Rukoro, to the lawyers who must draft the constitution was correct when they said it was agreed that the first president shall be elected by a simple majority of the legislature, constituted as an electoral college for that purpose. But it is not correct in the sense that it was not meant to be a temporary measure. It was a final decision which I suggested could be

amended in future should parliament decide to do so by a two-thirds majority. I don't want to be quoted incorrectly.

CHAIRMAN: I never had any intention to misquote anybody. I was reading the minutes. If you say I left out some part, that is a point, but don't say I misquoted you because was reading.

MR GURIRAB: We have to face up to what we are heading for. It is a matter on which we can beat our chest and differ. I seriously question the integrity of the minutes on this one, that there was an agreement. You can read it and read it. But they will not convince my recollection of SWAPO's position on the matter. In all our documents which we introduced, either in the Constituent Assembly, or at different stages here in this committee, our position, the most democratic position, is that head of state of the public of Namibia must be elected by the people by popular vote. That is the method. For all the things that we have ascribed to him, embodying as it does the national consensus, the will of all the people, that person, more than any other public official, must carry the will of the people. That remains the solid unquestionable position of SWAPO. So, there you have it on the table, honourable Chairman. If that would mean that we would reopen the discussion, so be it. If it means that we must vote on it, so be it. At this point I am not really, in this particular issue, interested in us going back, wasting time on what the minute said. SWAPO's position is that the president of the republic must be elected by popular vote and I shall come back to it for much as that will be required. Member of this House says you can read the minutes for as long as you want, but it will not convince me to change recollection, is it a point to take minutes, if whatever the minutes say will not change the subjective position of a member? Is it a point to take minutes? What we doing?

MRS ITHANA: On a point of order. Comrade Chairman, the previous speaker did not raise a point of order, he is raising an argument.

MR GURIRAB: The point is in response to my intervention. In proper democratic decision-making procedure minutes are taken and at some point the body has an opportunity to go over the minutes and correct them as being a true reflection of what was decided, and thereafter the body discusses matter arising from the minutes. We did not have that exercise in this body, so I believe that I am quite in order. If I have an opportunity to go through the minutes, I would have responded there and then, but they did not reflect the true meaning of the discussion that transpired. So we are perfectly in order. If there is place for appreciate our collective and individual contributions.

MR KATJIONGUA: As far as I know, and I have also participated in many meetings, the minutes that are taken by hand come for discussion, read, corrected, amended and then they are signed as true reflection of the proceedings of the previous meeting. I am not so sure whether verbatim records taken by machine are also correct in that manner before they become true.

CHAIRMAN: Honourable members, throughout the discussions we have been questioning decisions or misunderstanding of it. It is not the first time this happened. We have been coming back and saying "I don't think this is what I said". Firstly, verbatim minutes are minutes, there are mistakes obviously, but they are verbatim. They reflect what has been discussed. One member is charging the secretariat here that SWAPO's aren't properly reflected. That is his opinion, because many people have been saying thing about what we have discussed previously. We changed the positions every time from that I thought was the understanding. We didn't challenge that. I have been shocked sometimes that even when we are talking about the lawyers we sent to South Africa we said things that were not professional and the minutes were there, but we disagree with the minutes. So we have been doing that throughout, and if we really have to continue in the spirit that we started with, let's allow democracy to prevail. We have been allowing everybody to talk what he wanted to say, and if we are going to limit the language-usage and so on, then we are limiting our time to establish this constitution. That is why I have been deliberately allowed people to talk. Some could been ruled out of order, but I said it is good if we talk. Can we continue in that same spirit and talk and change situations if need be. As honourable Katjiuongua said, we agreed, but if we to reopen it, reopen it.

MR HAMUTENYA: The issue we are discussing is the procedure of electing the president which we want to inscribe in the constitution, and maybe there was a problem of confusing present situation and what we wanted the constitution to say in the long term. It is not correct that we agreed that the president will be elected by the National Assembly for ever, or in the constitution. I remind that we left this hanging in the air – and I want to say that again – before we agreed that

for the next five years for the president-to-be that will be the case. I want to repeat what I asked that we were not prepared to accept. I even offered an alternative position, it was not challenged. That if we have a problem with a president popular elected, then we have second-best, to automatically have the leader of the majority party as the president. That position was submitted. I was not ruled out of order by anybody, I don't remember that, and I sure the minutes will not say it was challenged and dismissed. It was not.

So, because we have always had a problem with the president being elected by the parliament, a so-called parliamentary president, we gave examples and I said that I don't see how, to my recollection it is in Lebanon where the president is elected by the parliament. Otherwise parliament should simply confirm the obvious and I gave examples. I don't remember anybody coming back to refute that position. So, that was another position which was left hanging. So, many things were left hanging if others concluded that we agreed that the president now and in future will be elected by parliament, then we had a serious misunderstanding and we now have to correct those misunderstandings. Our position has been – and I think it is still – that he is either popular elected or he comes automatically, as a matter of fact, from the majority party. Again the example that it did not make any sense in the case of South Africa with the last elections that somebody was going to put up another candidate other than F W de Klerk. So, it was obvious the situation where there is no separate election for the president, but the mandate of the people was given to the National Party of South Africa and automatically its leader became the president, so why not take that option if we are so religiously opposed to a directly elected president. But about him being elected by the parliament, he is just a puppet of the parliament - that we had a problem with, and we had a problem then and now. So let's address this question now. If we are going to make a compromise, fine. Threats of a second election, fine. We can go back, nobody is afraid of elections. If this is the bottom-line for others, we can accept that too.

DR TJIRIANGE: I want to endorse what comrade Hamutenya said. I just want to add that by saying that what the honourable Mudge is saying is true, he said so, and what Comrade Hidipo is saying is true, he said so. If we would have taken our position to be the agreement, it was going to be wrong. So it is wrong for the honourable to take his address to this body as the agreement. What we agreed on however, was the election of the president, that we did, and I left this honourable House clear in my mind that we have agreed on the election of president, and that we have stuck to our position that subsequent presidents should be elected by direct elections. I understood the arguments by others, but I don't remember us having said all the presidents, now and in the future, should be elected by parliament. That is simply not true, it is not correct. It was the position of people, but we agreed on the first president, and this is reflected in the reflecting given by our lawyers to the heavenly lawyers. I think our lawyers who went to Johannesburg understood us properly and they just did that. That actually underlines the correctness of my understanding. Because stood it properly to our lawyers. So, let us just go ahead and discuss now.

MR MUDGE: I do not want to argue about the minutes, we have them here, and anybody reading the minutes will agree that the decision was taken and any neutral or impartial person will agree that we have reached consensus that this constitution will make provision for the election of the president by parliament. Of course it was left open, it was agreed that this provision may be amended in future. It was not the understanding that will be amended now, but it was left open. It was agreed, it was understood that any provision of this constitution can be amended by a two-thirds majority in terms of the future constitution. I have no doubt about that. But Sir, I also agree that there could have been a misunderstanding, I don't know all I know is that we have discussed the whole constitution, the rest of the constitution on the understanding that the president will be elected by parliament. That was the understanding. In words, if we change this, then we start from scratch. Then we will have to discuss the constitution again article by article, because that was the understanding. Another thing that worries me a little, Mr Gurirab said that it SWAPO's position that the president must be elected by the people. If he had the opportunity to read the minutes he would have objected. I have a problem now. Is there a possibility that there might be many other agreements reached, that if members now read the minutes, they might come back and say they do not agree? When is an agreement an agreement? I just want to make that clear. But Sir, why are we here? We are here to reach an agreement on the constitution. Why then each other about technicalities? I think that we must ultimately reach an agreement, but let us only

accept that if we go through a whole constitution and then we find that we disagree on one point which is right at the beginning of the constitution, then we also have to accept the consequences, in other words, then we must also be free to say this is the DTA's position. In other words, we disagree fundamentally and we have to start all over again and discuss the principles. But Sir, we will have to report back and we are also responsible to report to our supporters and our people and we don't want to be blamed for the fact that we have to delay the process now. I just want to make that clear and I am sure that you will also understand that we have informed our people that we are making progress, we have informed them that we have reached consensus on the position of the president, amongst others, and now we have to go and inform them that apparently there is a misunderstanding, apparently we haven't reached consensus. We stand by the proposal as was apparently interpreted by the rapporteurs and by the lawyers who drafted the constitutions. I must say I am a little confused now.

CHAIRMAN: Yes, the point is, the day that we started after a big argument about the instructions of the lawyers gave to the heavenly lawyers, I am the one who said we are going to paragraph by paragraph. We seem to have agreed in the past and we deny. Therefore, while the lawyers are sitting here we are going to go paragraph by paragraph so that we can agree in their presence and what have agreed to we will not come back to, because we have been coming back to things already agreed on. The preamble, for instance, we all agreed on it the first day. We have discussed it already three times over and over again. We have been doing that with everything else. I said we have to go point by point, so that in their presence we agree and they take it down and we don't come again. But yesterday and today we have been doing that. We went through the things already agreed upon over and over again, debating them afresh.

MR KATJIUONGUA: Only a question to Mr Mudge. Could he just clear up, did we agree that the first president will be appointed or elected by parliament, and if that is the basis of his draft, then we are talking about the same thing. About future presidents after five years, I think that is a different matter. We can say, even in the constitution, that the first president elected by parliament, the next president by direct vote, but that is a matter after five years. We are dealing with the constitution to finish it now, to declare the country independent. Can we divide those two things, a future president and a president now? We want the president we have now to be taken out of being a member of parliament, out of sitting of parliament, out of this arrangement, to be something else also right now, because I think it is a point of material difference.

CHAIRMAN: That is a very concrete proposal.

MR MUDGE: Wasn't that the case only that the constitution makes provision for the election of a president by the parliament?

MR KATJIUONGUA: This one?

MR MUDGE: No, The president, but of course it can be amended. Let me say this just to get clarity. You say we must refer to the minutes let me just read two sentences: "Mr Rukoro: The proposal is that the president shall be elected by the legislature acting as an electoral college." That was the proposal by Mr Rukoro. I repeat: "The proposal is that the president shall be elected by the legislature acting as an electoral college." Mr Ruppel: For the first period and then we leave it open. Mr Mudge: Why should we leave it open?"

And then I explained and then a member said, yes, I second it" and then it was agreed that the constitution can be amended in future and it can still be amended, there is nothing preventing the government to amend the constitution. But the agreement was that in terms of this constitution, the president will be elected by parliament. Mr Chairman, if we want to amend that in future we could do that, but then one thing we must also accept, when we amend the constitution as far as the election of the president is concerned, there will be proposals to amend other provisions in the constitution, because we cannot divorce.

CHAIRMAN: Honourable Mudge is using the wrong word to say "amend". We didn't adopt it, we are amending it, we have doing that since yesterday from page 1. We have been discussing and changing things. So we aren't going to amend, but you are saying other things are going to be affected in future when we go on to change. But we have a constitution, we are amending.

MR MUDGE: So you want to amend it now.

CHAIRMAN: No, what have we been doing since yesterday? Since yesterday we have been discussing from article 1 up to article 27, changing things. We have been discussing throughout since yesterday, we changed things. Is that amending?

MR CHASKALSON: Mr Chairman, if you invite me to say something, there is something I would like to say, and that is we were not given any records when we prepared the draft constitution. We didn't have the record of the debate. We were given the written instructions, and the written instructions, when it deals with this, say: "To add paragraph (2), which contains the provision for the direct election, the first president shall be elected by the National Assembly." That was the written instruction we got. I do not have my notes of my discussions and my colleagues may remember what had happened. I think we were told, but I do not have any notes of those discussion and my colleagues will have to recollect exactly what was said, was that there had been no other agreement reached, and if that is so, we could do nothing other provide on what had been agreed there, and I don't remember any other discussions, but I must ask my colleagues as to whether they have any notes or not. I do so only because it was mentioned that we were giving effect to agreements, and if you look at the written instructions, it is simply says the first shall be elected.

MR KATJIOUNGUA: Don't you think that in this case, what stands on page 26 is not accurate? Then you should have said the first president should be elected by the National Assembly

ADV CHASKALSON: I agree with that absolutely, and how it emerged after that, my colleague. But we were not given the debate and the suggestion that we construed the debate or the written papers in a particular fashion is not correct, because we didn't have that. But I should ask my colleague to express their recollection of what happened. I do not have my own notes with me here.

PROF WIECHERS: Yes, I agree with my colleague, it was Clearly understood by us, and we were instructed, this committee and the Assembly, or your committee decided that the first president be elected in this way, and then in drafting and discussing it, my problem was and our problem: do you write into a constitution the first president be elected in this way and leave it, and if it is not amended, then the whole executive will just fall into a black hole. So it was a question of drafting, unless there was a clear decision on how the second election will take place, and that wasn't there. So we did what we had been asked, this is your first constitution of the National Assembly this is your first president and we wrote in the margin in Afrikaans: "Huidige een."

MNR MUDGE: That the way you were briefed, that is correct, it is in here, but that is not the decision.

CHAIRMAN: Honourable members, we have been changing things, why do we get bogged down? Why don't we go ahead as honourable Katjiuongua said that if we are going to change, we have been doing that throughout?

MR BARNES: Listening to the discussions here, I come to the conclusion that the point in dispute is really: did we agree that the first president shall be elected by simple majority of the legislature, constituted as an electoral college for that purpose, as was drafted and reported by the rapporteurs and signed by the rapporteurs on the 20th December 1989? If that is correct, if that is actually factually correct, grammatically correct, then we have to either accept that situation or accept that we made an agreement and we want to change the agreement. My honourable colleague, Mr Gurirab, has placed this decision in dispute. If he is still firm on the dispute that he does not accept that such a decision has been taken unanimously, I would very much like to hear. It is absolutely correct, as you put it, that we have been changing as we went along. I think that was the object of the exercise to draft a constitution. If, as the honourable Mr Gurirab said, that SWAPO's bottom line is a president elected by the people, then I am sure the honourable member will concede that we are then changing the decision that we took about the first president. This is the point that I feel is relative in solving the misunderstanding. I would clearly like to hear, if that is SWAPO's bottom line, then they accept something has been agreed, because it is on paper by the rapporteurs and also so reported and also so reported to the experts. Let's first start and say that we want to change that. It is absolutely in line with your ruling and what you have been trying to explain, that even the preamble has been changed, perhaps consistently. If that is the case then we have a point of departure to discuss.

CHAIRMAN: Yes, that is the agreement.

Mr BARNES: If you will allow me the first president will be elected and that will be drafted into a constitution, and that all subsequent presidents will be elected on the change of the constitution that is decided by the National Assembly.

CHAIRMAN: The confusion is there, that is where the difference comes. Some are saying they agreed that the first one will be elected by the Assembly; there is no question about that, no debate about that. They are now saying they didn't understand that to mean the subsequent ones are going to be elected the same way too. That is where the dispute is and the lawyers are also saying they didn't get the instruction that way, but in drafting, according to Prof Wiechers, they took the subsequent ones instead of the present one.

MR RUKORO: I think we have a problem and we are really busy wasting a lot of time. It is clear that we are entertaining divergent opinions as to our recollections of what really was decided on this particular question, and my own recollected is more or less as stated by Mr Mudge, that on the question of subsequent presidents, at best that question was left open; that the only thing on which we reached firm agreement was the election of the first president and that the question of subsequent presidents was not addressed. At best it was left open, and I think that kind of construction is consistent with the fact that by saying the first president was to be elected by parliament, does not for instance rule out the possibility that subsequent presidents can equally be elected by parliament, and in the same breath it does not, by necessary implication, suggest that all subsequent presidents must be elected by a different mode. That is why I feel that either way this question really was left open.

Because of our disagreements on this question I think let's be practical in the sense that we agree to disagree on what we agreed upon last time, and in the spirit suggested by the Chairman here, to all intents and purposes what we have been doing from Tuesday was to reopen basically each and every article for discussion. Therefore I really feel that on a practical level, continuing this debate on what was agreed will lead us nowhere. Let us simply accept that we disagree on that point, our recollections on that point.

CHAIRMAN: The member is disputing, we must let people talk. That is the only way to get somewhere and then we disagree tomorrow.

MR RUKORO: And that even if we are going to read the minutes, we are going to dispute the minutes. That seems to be also clear now. So, against that background I want to make a concrete motion, that simply close this discussion on trying to agree on what we agreed upon last time, and secondly, that we discuss this question and all other.

Mr HAMUTENYA: I think the truth of the matter has been summed up by honourable Rukoro, and I don't think anybody can say any more than what he has said. He said that we are locked in a disagreement and no amount of repetition of one's position will change the fact that we are disagreeing. So, he is saying that we agree that we disagree. So, therefore, on procedural issues we have now to agree whether we are accepting what has been proposed by honourable Rukoro that we stop repeating and stating positions. If need be, let's vote, let's vote on the proposal to continue repeating ourselves or to start afresh and make new proposal and resolve afresh the issue. I am therefore seconding the motion of Mr Rukoro.

Mr KATJIUONGUA: I just want to add something to my idea, so that when you are going to adjourn you can take that into account. First of all, I think the Mrs Ithana is right in a sense. Out of all of us here two colleagues, Mr Gurirab and Mr Hamutenya, say that we did not agree that even the first president will be elected by parliament.

CHAIRMAN: they are not saying that.

Mr KATJIUONGUA: You say for now or forever. That is what you said.

MR HAMUTENYA: No, I never said that.

MR KATJIUONGUA: The first one was agreed.

MR HAMUTENYA: yes, I said on the next score I agree with Mr Mudge.

PROF KERINA: I have been trying to trace the beginning of the discussions with regard to the constitutional draft before us up to the time when it was referred to the attorneys, and the product that we now have before us. Mine is just a humble appeal. We have travelled a road to be here, and I think as a newcomer to the discussions I am very honoured to be part of the spirit that has been demonstrated by all the parties and all the representatives of the various parties in this committee. I have listened very carefully and sensitively to the reservations, to the disagreements, to the agreements and to the disagreements of the agreements, and I think finally we are at the point where we have to find a solution to what we have been discussing this morning. I don't think there are serious differences. I think the test relating to the president is

very clear and I would like to appeal to all of us to agree that the first president be elected the National Assembly as stated in this draft.

CHAIRMAN: The draft doesn't say "first". It says: "the president shall be elected by the National Assembly. " Do we therefore understand this refers to the first president? That cannot be.

Mr TJIRIANGE: what if we can go about it this way. I would just like to amplify by adding that the first president will be elected by the National Assembly. However, all the subsequent presidents will be elected by direct election. Then you stop there and continue.

MR BIWA: I am not taking the floor to offer a solution; I merely want to state our position in regard to this issue under discussion. Unfortunately some of the things I wanted to state were overtaken by events; therefore I will confine myself to those things that keep within the framework of what we have agreed upon. But I would like to state that it is the feeling of our caucus that we stick to the agreement which is reflected in the draft, namely that the president will be elected by the National Assembly and that he will be a member of the National Assembly. But in the spirit of what we have decided to do now, I would like to state that we – and that is the feeling of everybody – are prepared to go along with an arrangement or a provision where the president is elected directly by popular vote, provided that the powers conferred upon the president and the limitations put to the exercise of this powers are not affected in any way. Secondly, provided that parliament has the power to impeach the president and I think that is provided for in the constitution, and we would like to agree well in advance, while on this issue, that we will allow the parliament to impeach the president. Thirdly, there should be a provision in the constitution empowering the president to address parliament and giving the members of parliament that power to question the president.

Mr MUDGE: I don't want to make a suggestion nor a proposal, I am not going to take that risk again, but before we take a decision this time, then I think there must be absolute clarity exactly what do we decided or what we have decided. What I want to know, the honourable member Mr Tjirange said that we amend this provision to say that the first president will be elected by parliament, subsequent presidents will be elected by the people. Is that the only amendment? Will the rest of the agreements or the proposals or whatever remain the same or will it have consequences as far as the rest of the constitution is concerned? In other words, does that mean that when I say yes and get to the next article, then the honourable member will say "but Mr Mudge you agreed that the president will be elected directly and because of that you will have to agree now that there be an amendment of this article as well, if that is the case, then I propose that we first discuss the whole chapter and then we can take a decision. I just don't want any more misunderstandings to arise.

CHAIRMAN: Could I just also say since Tuesday we have been discussion every sentence. So, do you mean the same will apply even if you agree now? When we are coming to article 9 we have to discuss it again and say yes or not. We have been doing that throughout.

MR MUDGE: That means that we will now start from scratch and discuss the whole constitution.

CHAIRMAN: we have been doing that. What have we been doing since Tuesday? This is what we have been doing. That is my problem. When I start the meeting I said now we are reopening the whole thing and since we are disagreeing on decisions I said: let's go over it in the presence of these three gentlemen, so that when we decide on a thing, nobody is going to say "I didn't agree": so that the minutes will take decisions properly this time, because I ...blame for not recording things properly.

CHAIRMAN: Can we summaries the decision by one question? If we are going to do that, the concomitant other action is voting. If I have to register a decision and there is a deadlock, I have to put it to the vote. The decision now is that the first president will be elected by the National Assembly and that the subsequent President will be elected by direct vote, by the people.

MR MUDGE: In all fairness, can you expect us to say yes without knowing what the powers of the directly elected president will be?

CHAIRMAN: You asked me and I said we will go over it.

MUDGE: No, it is not as easy as that. You will say: "Mr Mudge, you have agreed that the president will be elected directly" when I complain about the powers, and I said I would have supported this if the president was not elected by them. I think we must look at the president, we can take a decision, but at the end the whole chapter must be accepted as a chapter. You cannot discuss a constitution point by point, it is not possible.

CHAIRMAN: Why are you doing it? So, there is no problem, we can accept it. The proposal is that before I can accept that other things are going to be affected, so he is proposing that we discuss the whole chapter on presidency. Fine.

MR MUDGE: Because I want to put, for instance, a question at this point in time: The honourable member Dr Tjirange proposed that the president be a member of parliament...

CHAIRMAN: But I thought we are discussing the presidency now, the whole chapter including his participation.

MR MUDGE: In that case again, I don't want to waste the time of the committee – we have now a ball-game, an entirely new ball-game, because we are now not properly prepared for a new ball-game, and that again we take decisions before noon and come back tomorrow and say we do not agree with that. We might go back to our lawyers...

CHAIRMAN: Wasn't there a decision that I must summaries so that we take it as a decision?

MR MUDGE: No, Mr Chairman, we are not allowed to bring our lawyers in here. Whatever we discuss now will be a new ball-game and we have to properly consult and properly consider.

CHAIRMAN: I have to propose that we adjourn indefinitely, because I do see there is filibustering going on. There is new information from lawyers, and I see there is filibustering, there is no goodwill and therefore I feel we must adjourn indefinitely.

MR MUDGE: Mr Chairman, if there was no goodwill we would have insisted that we stick to the minutes. The goodwill on our side is proved by the fact that we say fine, let's re-discuss the thing. But now we are starting afresh, we are starting from the beginning unprepared.

CHAIRMAN: Could I just ask a question, what have we been doing from Tuesday on? From Tuesday on we have been going through this paper afresh.

MR KATJIONGUA: We are all entitled to our opinions, but the way I look at this thing, I don't want to take responsibility for any mess about this whole constitutional process and I think we must all be careful. Each party here should behave responsibly, that we don't try to throw the blame around should things go wrong. So, I think we have accepted, I don't see a fundamental problem if we say the decision we took previously have the first president elected by parliament. Then there were arguments whether future presidents will be elected by parliament. Some say it was not accepted that future presidents will be elected by parliament. Now we have a bit of a problem. I think my immediate concern is the election of the first president by parliament and there the feeling is the future presidents will be elected directly. Then I feel we must also add to that, that since we are now discussing a president elected by assembly this time and the powers of future presidents who will be elected directly, then you see there is a problem there. Therefore, when we are discussing the powers of the president here, I think we should take into account those two periods and decide how we define the powers here, because the president elected by parliament is accountable to parliament in so many ways, and there president elected directly is not accountable to parliament. There is that type of distinction. It means that when we discuss the powers of the other institution we are going to have two elections in future, for parliament and for the president. I think it is implied so and I think that falls within the ambit of section (3) and (4) of the 1982 principles. I feel we should discuss this thing, we agree in that fashion, and we discuss this paper one by one. Then you must understand that when I am going to discuss, I am going to discuss having in mind that this affects all issues across the bar. But you can start with section 1, the president; I don't think it makes a difference.

MR ANGULA: Yes, I would like to get us out of the confusion, that as long as there are parliaments, and as long as you say that the power ultimately rests with the people, whatever president we are going to have will have to be accountable to parliament in one way or another. It is a question of degree we are talking about. I mean, how do you pass a budget? You control the president's power through the budget, for example. If you think that a certain arm of the government is performing badly, you can say "since we want to curtail their activities we must not give them much money." So there are many ways to control the president. But I have no difficulty with what Mr Mudge is saying. Why don't we go article by article? I think what we are trying to do here is to establish in terms of the division of power and checks and balances, is to establish the distance of the...between the president and the cabinet, the president and the National Assembly, the president and the judiciary and all these kinds of things. These are the things we are trying to establish by way of creating the necessary balances among these powers. So, why can't we go article, then by article, then whatever fears you can bring. But I understood that we

are doing here, talking about the executive, the judiciary and the legislature, we are trying to establish the necessary balance. I thought this is the operating thing among these three things. If we can go article by article I think we should get somewhere. If we can go article by article I think we should get somewhere. When you have a concern you raise it, when you need to go and consult your lawyer. Let us agree to what honourable Tjiriange has suggested and let us go to the next articles until we come to the end of the president and see whether there are any problems.

DR TJIRIANGE: I think we will need guidance. I thought that we have reached an agreement. If we are going to take the floor again to reopen the discussion, then I would inscribe my name to speak again. The threat is being issued that it is a new ball-game. What does it mean, the threat that even after we have agreed here some delegations are going back to their lawyers? Does it mean that then we have to come back again to things that we have discussed? So, if there is an agreement I propose that humbly, but in all earnestness that we get to the paper go through the work as we have been doing. If that is not what we are here for, then let us have a discussion, because we are going to continue asking for the floor and state the obvious. When we get to the right point dealing with powers of the president, we will look at it in relation to the assembly and the judiciary. We are just on the first page of the whole thing. So, if we are going to take the floor and issue threats, then I really want to make a substantive statement. I am in your hands, honourable chairman.

CHAIRMAN: I have said it a hundred times now, that we have been doing what honourable Nahas is saying to go article by article. That is why we are now on page 26. Can we go ahead and do that? Article 28(2).

MR RUKORO: I assume that the suggestion by honourable member Biwa is still on the floor, that the first president be elected by the National Assembly and subsequent ones....

DR TJIRIANGE: By me.

MR RIKORO: By Dr Tjiriange. I was going to come up with a slightly different one, my motivation being that I think the discussion of the last two days clearly suggest that our democracy is very young one, very unsophisticated in some of these complicated constitutional devices, principles and that the implications, whether we can live with the implications of two elections, one for the president, one for the legislature, I am not so sure whether you fully appreciate some of these things. That is why I would rather propose that the leader of the majority party, in the event of a clear-cut majority, be the president of the republic of Namibia, and where there is no clear-cut majority party, then the leader of the coalition of parties, as determined by those parties, be declared the president of the Republic. So, we have only one election, just like we had now and that will take care of both our present situation as well as the subsequent elections.

CHAIRMAN: There is a proposed amendment to the previous one.

MR RUKORO: That was one of my key questions that I wanted to ask with reference to the proposal that the first president be elected by the assembly. Does that mean that he must be elected be elected from amongst the members of the Assembly and if so, does that mean he must forever remain a member of the Assembly, or can the president simply be elected by the assembly, maybe even from amongst the members, but that does not necessarily mean that for instance he cannot resign his assembly seat to effective separation of powers between the legislature and the executive. That is the key question. Accountability, as far as I am concerned whether he is directly elected or not directly elected, whether he is a member or whether he is not a member, ultimately, through his cabinet of ministers and the prime minister, he must be accountable to parliament, in particular through the overriding power in article 31(7) that says parliament can reverse, review, correct any action taken by the president in the exercise of any of his functions. So, to me there is no doubt that he is and must be responsible to parliament via his cabinet of ministers.

MR ANGULA: Yes, honourable Mudge has asked very pertinent questions. Is about the mode of elections how are we going to conduct these elections. I think that is a quite important question. In my limited experience I have seen in Zambia that in general elections do take place at the same time as presidential elections, but there it is on the constituency basis. When you come to a particular constituency you are voting for a particular candidate, it is not a party list, so that makes a difference. But I don't see it as insurmountable arrangements, by way of saying that the same day people are electing the party list, they should also elect the president. I don't see any particular problem there, it can be arranged. If we can solve that problem of how to conduct the

elections as to the powers of the president, I think that is obvious. There are many mechanisms of controlling the executive through the assembly. I don't think, in my opinion that the president should be part of the Assembly, to be honest. This president should be above party-politics, especially in our country. Then he is there on the party thing. Then whatever I am doing there I will speak on behalf of my party. I will be there to defend my party and I don't think it will be appropriate for the head of state, who is supposed to represent everybody, to speak on behalf of a particular party in assembly. He should represent the interest of the country as a whole.

The second aspect of it is the question of the balance of power, separation of powers. If the president is going to sign the laws and he has a right to veto them I don't see the reason that he sits there and debate the laws and he can then later say "I am not going to sign it because he or she has taken that position in the debate." He should have independent judgment either following from the kind of submissions made by people affected by this law and inform the Assembly accordingly, "gentlemen, the things you are proposing, there is strong opposition from the people who are affected and therefore I feel it is not in the best interest to sign it." Let him approve of it independently, not as part of the assembly.

MR KATJIUONGUA: I think the first president will have to be a member of the Assembly or in the Assembly, whatever you call it. We may have to decide between the powers of the president in the period of transition, the five years and how to relate that to the rest of the other powers, and then the powers of the president permanently, what they will be in relation to the other institutions as well. I am glad that Mr Angula raised the question of Zambia. If we say the president is elected by the people, the name of that person must be on a ballot box for election by the people. You can't turn the leader of the majority party ultimately into the president. So, therefore I think we should not have too many elections. I think if we have a national election and if you like. At the end of the day as long as we have a party-system – I think it will be very clear to the people. I don't think we will confuse people. Let's take the position today. If you say the party, SWAPO, wants its leader to be the president of Namibia, the candidate, then they put that name on the ballot and SWAPO, the same party wants members to the National Assembly and regional councils. In essence really people are voting for the same party, not different parties, and the same thing will apply to all the parties. So at least we minimize the number of elections. Which means the president is elected now directly by the people, whoever that might be, so it is not just to parliament. But if the government goes, I think the democracy, brother Tjiriange; sometimes it also happens like in France or America that the president and the majority of parliament may not be the same thing. So, they have to compromise, there is no choice. But supposing they all come from the same party, the majority and the president, then you can do what you have either in Britain or what you have in Germany. Let's say the government messes up and not the president, there are problems in parliament and the government will have to resign. What they do in Germany, if Mr Hamutenya is the prime minister and somehow he runs into problems in running his administration, let's say he is involved in scandal of some sort, he goes with me to Frankfurt and somehow he gets lost there, then he will have to go, you don't have to say the whole government must go. The entire parliament does, they ask the parties "could you try to form another government?" He may form a government out of his own party if he still has a majority, it's a different man but the same organization, or he can form a coalition with somebody else and he has a majority and until the next normal election they work this way. That is another possibility. The other possibility that if you say the government gets into trouble before its term ends and it must go, whether you should have a general election for parliament, I think that is another problem. In France, if that should happen, because the president is elected in a separate presidential election for seven years and the assembly for four or five years, if the government goes, everybody goes and they have a new election for the National Assembly, but that is a different thing if we want to have one national election. Then I think we have to do it this way. But all I am concerned about is the principle the institutions, all of them, re elected, the president is elected, the parliament is elected and all the other bodies are elected and hopefully at one go. But now the refined points, I think there is a lot of constitutional material that I don't think I am in the position right now to produce, but lawyers and knowledgeable people can look into that and say how that type of model can work considered our circumstances.

DR JITENDERO: I just wanted to make one point and that is in relation to present situation whether or not the president can be a member of the state, the presidency, legislature and

judiciary, and again, as honourable Rukoro has submitted, under the present circumstances, because, of the proclamation that has put us where we are, that would be a technical point and I think the distinguished lawyers could help us here. I do not see any reason why, if the law or the practicality of the situation requires, as I said, in the interest of separation of powers that the president is elected already on party list and therefore in the interest of separation of powers he steps down from being a member of parliament so as to facilitate the desire that we are trying to establish in terms of separation of powers, and as I see it this is a technical point. If there are any difficulties that are insurmountable, I think we can be advised on it. But the reason is not capricious why the submission is being made that he cannot be a member a member of the National Assembly under the present circumstances. Of course that has implications in terms of the institutions that we are trying to create here, and this is why I wanted us to be more systematic to go over the list and see the contradictions. When you say separation of powers, executive president, is it in line with what we are proposing here, so that the lawyers can take very accurate note as in relations to what we want to establish. It seems to me that the discussion is very general now. It isn't very helpful, we are not making progress and again, for the third time now, I want to ask that we specifically make our points in relation to what is stated, so we can eliminate the paragraphs and include relevant paragraphs in relation to the institutions that we are trying to establish.

Mudge: Again agree with the honourable member Angula, the president must be above politics. That is why I wanted him to be above politics. That is why I wanted him to be ceremonial president. But Mr Chairman, I have a problem in combining a president who must be above politics and a president who has executive powers, exercising those powers in terms of the constitution and being led by a majority party, telling him what he should do. I don't think that is possible. I am only identifying problems at this stage. Are we now going to decide that for the first five years the president will be elected by parliament or are we deciding that the first president will be elected by the assembly? What happens if the president resigns because of ill health or he dies after six months, because we are all human beings? Does it mean that after six months we will have another election? That also stresses the point and emphasizes the point made by Mr Ruppel when he said that you can decide that the two elections must take simultaneously, but you don't have control over everything in life. Things do not always happen the way you plan it. But it must be taken into account. When you say that the leader of the majority party becomes the president, what happens if the party replaces its leader? Things like that happen and you have to take it into account when you make your decisions.

A last point that I want us to properly consider is the question of the separation of powers. I think the honourable member Mr Tjitendero said, or one of the members mentioned the fact that in the separation of powers between the executive, meaning the president. Now the question is and there must be absolute clarity – is the cabinet part of the executive or not, and there must be no misunderstanding whether the cabinet is part of the executive or not. Powers in terms of the constitution and being led by a majority, telling him what he should do. I don't think that is possible. I am only identifying problems at this stage. Are we now going to? Powers in terms of the constitution and being led by a majority party, telling him what he should do. I don't think that is possible. I am only identifying problems at this stage. Are we now going to decide that for the first five years the president will be elected by parliament or are deciding that the first president will be elected by the assembly? What happens if the president resigns because of ill health or he dies after six months, because we are all human beings? Does it mean that after six months we will have another election? That also stresses the point and emphasis the point made by Mr. Ruppel when he said that you decide that the two elections must take simultaneously, but you don't have control over everything in life. Things do not always happen the way you plan it. But it must be taken into account. When you say that the leader of the majority party becomes the president, what happens if the party replaces its leader? Things like that happen and you have to take it into account when you make your decisions.

A last point that I want us to properly consider is the question of the separation of powers. I think the honourable member Mr. Tjitendero said, or one of the members mentioned the fact that in the separation of powers between the executive, meaning the president. Now the question is and there must be absolute clarity – is the cabinet part of the executive or not, and there must be a misunderstanding whether cabinet is part of the executive or not.

Consulting cabinet does not necessarily make the cabinet part of the executive.

CHAIRMAN: We decided on that yesterday. The executive power of the Republic of Namibia shall vest in the president and his cabinet.

MR. MUDGE: I hope that we all understand what that mean; I hope that there is no misunderstanding. There is nothing wrong if I want to be assured. You know, since yesterday things have changed a little and the understanding as well. So, let's just get absolute clarity on that.

CHAIRMAN: We must be consistent. Since yesterday I have been giving the floor to the lawyers.

MR. MUDGE: Mr Chairman, if it worries you, forget about it. I don't want to make things difficult for you, let them talk.

PROF WIECHERS: I am not going to influence principle decisions, but can I just answer honourable Hamutenya's questions on direct election of president. These electoral systems are very much involved, so you will have to go back. It is all for you to decide on subsequent elections. There are these interrelated problems with the dissolution of parliament as Mr. Ruppel has pointed out, but there is also the electoral system. Most people generally think the American President is elected by the people directly, but it is an indirect election. People are elected to electoral colleges and then on the strength of their support you know who is going to be the president. But it is not a direct election in the sense that they vote for Mr. Bush. They vote Mr. A, B, C, all the members of the electoral colleges and then you know who they support and then they bring out a formal vote. In the French direct election there is another peculiarity. Are you going to have a direct elected president with a 51%? In France, if the president does not get 51%, then there is a second ballot and it must be within a certain time, because it could happen, depending again on your nomination system, that you have eleven candidates, ten or five, and that the winning candidate will have 20%. In France, if some are eliminated, you have a second ballot in order the president being directly elected must at least have 51% and there are also direct electoral systems. That is my first answer.

The second one is on the membership of the Assembly or not. It makes sense in constitutional terms that if you have an executive president, how he is elected is for you to decide, whether by parliament, he is still elected. There is an election, although one could know under certain circumstances who would have the majority support. But it is an election, because you could in future have a coalition government where people will have to bargain about the election of the president. It is an election, it is not a rubberstamp. But there is a consistency once he is elected that if he is a member of parliament, he remains a member of parliament and you ask for that, then for whatever reason, as Mr. Ruppel pointed out, if he is dependent for his presidency on membership of the Assembly, then if the Assembly is not there or for some other reason he becomes disqualified or the Assembly is dissolves then the rug is pulled under his feet, he is not qualified to be a president which could lead to quite a lot of instability. It is one thing to dissolve a parliament; it is quite another thing for a state not to have a head of state. There are also other implications.

CHAIRMAN: We have been going through articles. I mentioned article 28, but there was a crisis, a misunderstanding and that is why. Yesterday I thought we were going paragraph by paragraph. I think that there is a crisis and we are talking about decisions. If you look at our decision – making mechanism, that is how decisions are ending. The one says this, the other one says that and the other one contradicts it and I say we have decided on that. If I now have to summarise as I asked, what do I summarise? First I am going to ask questions and you are going to ask the floor and talk and I cannot stop you that is your democratic right. But I got the question of first president will be elected by the Assembly, the subsequent one direct. That is the decision I can summarise. But then questions were raised which seem to have negated that decision, because there is doubt about the election of the subsequent ones. One election only having two ballots, because it would be difficult, unless we stop and say “decided now. That we decided to elect the first president by Assembly, subsequent ones direct. Is that a decision, honourable House? I just want an indication, debate no. Can we vote?

MR. KATJUONGUA: No, we aren't voting.

MR. BARNES: What is the decision?

SECRETARY: The first president will be elected by the Assembly and subsequent president is elected by direct vote.

MR. MUDGE: Even if that is within six months?

MR. RUKORO: Just for the avoidance of any doubt, in relation to the first president, does that mean that he is part or that he is not part of the Assembly?

CHAIRMAN: That is a separate issue.

PROF WIECHERS: Just on a point of information, I pointed out the various direct electoral systems. Are you going to expect us to write first president elected in this way, subsequent by direct vote and then leave it for six or five years to work out this direct system, because as I have pointed out, it is difficult, you could have in six months time the necessity to have this direct election without a system in place. So, I must call on members to think about that, so that we can at least have the principles. The only way where a direct system works easily is in a one party system, where you have a few candidates, it is all in the family and you have the majority.

MR. MUDGE: What was the decision? Is there a decision already?

CHAIRMAN: We asked the secretary to read it.

MR. RUKORO: That is his summary, we haven't agreed yet? We still have to say yes or no and I think we were in that process of saying yes, the summary is correct, no, it is not correct.

MRS ITHANA: It is obvious we are not going to resolve this issue the way we are handling it now. Can I propose that maybe we employ another way of reaching decisions, voting?

CHAIRMAN: According to the rules you cannot vote.

CHAIRMAN: Could we adjourn the meeting, because you are reopening the debate again.

MR. MUDGE: Mr. Chairman, I think it is necessary for us, if the meeting wants us to support the direct election of the president, then it will be necessary to spell out what we mean by direct election. According to the lawyers – and I agree with that – in most cases presidents are elected by an electoral college. It means that the National Assembly can also be such a body which can elect the president, which means that election by the Assembly does not actually mean indirect election, although it was not made clear beforehand that this Constituent Assembly is elected to act as an electoral college. But on the other hand, in spite of that we are now going to allow the National Assembly to elect the president. But I do believe that we must spell out what we mean by a direct election. Otherwise we leave it open and it might happen that in a year or two, or three or five, I don't know we have to have an election and there will again be confusion. I don't want a backtrack, but when we took a decision yesterday about the executive power, at that time we did not know what the decision would be when it comes to the election of the president. I would want to have more clarity on the exact meaning, the legal meaning of the words “the executive power of the Republic of Namibia shall vest in the president and his cabinet.” Is there a difference, legally, between that wording or formulation and “a cabinet headed by the president?” Is it just a matter of wording or has it got different legal implications? I am not asking these to be difficult, I am asking these questions to make it easier for my party to take a decision.

We also want to know whether the president will be a member of the Assembly or not. I think it is important for us to know whether he will be a member of the Assembly and whether he will be a member of the Assembly or not. I think it is important for us to know whether he will be a member of the Assembly and whether he is accountable to parliament or not, taking into account that we are discussing – let's hope – the first five years, because it differs. Somebody here suggested that we should discuss the five years and then discuss the period after that. I think it was Mr. Angula, no, Mr. Tjitendero. I think that can also be done, that we look at the first term and then look at the second term. But it is very difficult for us to just decide now the first president shall be elected by the National Assembly and all subsequent presidents will be elected by direct vote, without spelling out the implications or at least understanding all the implications of such a decision. But anybody can make a specific proposal and we can look at that.

MR. ANGULA: I would like first to respond to the first query by honourable Mr. Dirk Mudge with regard to the formulation “executive power of the Republic of Namibia will be vested in the president and his cabinet” and I want to respond to that query and I want to also invite our learned colleagues to advise me whether my understanding is correct. In fact, I am the one who brought up this issue yesterday and I was guiding my mind by the concept of accountability. Somebody must be ultimately accountable for the actions or non- actions of the government. You cannot just say a collection of people called the cabinet are accountable, all of them. Yes, they are, but in my mind I want a differentiation between the accountability of the president as the head of state, he is accountable to the nation as a whole of course, he is accountable to the

executive itself, to the national Assembly and the other institutions of government. In mind I have no difficulty with that. Individual ministers, they are accountable to the president too as much as they are accountable to the people and the National Assembly. So, the reason why I raised this issue is actually on the principle of accountability, that ultimately somebody should take responsibility for the government. Ultimately. You cannot just say a collection of people, as much as we want to be democratic as possible. But I stand also to be advised by the learned colleagues here.

Membership of the National Assembly, I think I have talked too much about that and don't want to repeat myself. I want only to emphasise the fact that if we are still going by the principle of division of power and authority and the necessary checks and balances, to me it is quite clear that the president should not be part of the National Assembly, should not be part of the law – making body because he does contribute in his own way to law – making. He can reject or accept and he has a group of lawyers who are advising him and he has the general feeling of the nation to judge about. Direct vote, I think the problem we have with the direct vote is actually that we trying to balance the cost against the practical possibilities. The cost today , if the president should be elected alone, if we are going to have presidential elections this year, means those who want to be president – excluding myself – have to run all over the place campaigning, promise something. Then they are on the ticket. Of course, you get through the presidential elections, somebody is elected as president. Then you may follow that with parliamentary elections, party list, proportional. You are running two things, perhaps this year presidential elections, next year parliamentary elections and perhaps the other day we have regional elections or municipalities. Now we think of this in terms of cost. Then we came up with a formula, saying that in order to save on the cost, perhaps the direct election of the President can take place simultaneously with parliamentary elections, which simply means that the voters come there, they vote for their candidates, for their party and they go to vote for the president they want to vote for, because it is party list. So it is a simultaneous thing. When you finish voting for the party vote for the president, and I think it is where Prof Wiechers was talking about the American system whereby states, through caucuses, elect the president. I think for us that is too complicated, because you go through a system of primaries and what not. It just has to be something direct and you are through with it. So, from this point of view I don't see any difficulties by way of procedure. Of course, you will have to have two types of ballot papers. I don't know whether they are going to appear on the same ballot papers. I don't know whether they are going to appear on the same ballot paper. That is a practical thing. But I think for own purposes now we can say something general about direct elections, but there will an electoral law which will state how elections are going to be conducted, who is going to conduct them, what will happen , like in normal circumstances. I don't know whether we want to include the electoral law in the constitution, but I thought we are just clarifying our minds to see if this thing can work. That is what I assume, that we are asking these questions to clarify to ourselves that this thing can work. In case, my understandings as far as the electoral procedures are concerned, it is a question of costs. That is what we are talking about, in terms of money, in terms of time, to have two electricians, one for the president, one for the members of the Assembly. That is what I think the problem is. In terms of procedures I don't see that there are any insurmountable procedures.

MR.BESSINGER: Mine is an appeal. We find ourselves now in the situation where in asking a question we make speeches. We have been coming along fine up till late yesterday because we had a procedure that we confine ourselves to the procedure that we are following. To come and ask now at this stage what is ceremonial president and what is an executive president, I have to answer Mr. Mudge in his words. The very first day this standing committee sat Mr. Mudge's words were, almost verbatim: "The words ceremonial president of executive president doesn't really mean anything."

MR. MUDGE: That is not the question I asked now.

MR. BESSINGER: The issue was: what powers do we give to the man or to that position. So, that is what we want to do now. We want to give certain powers to that person or withhold certain powers from him in relation to the judiciary and the legislature. Now, let's do that, because otherwise you are going to sit and make speeches.

DR. TJITENDERO: That is right; I am addressing myself to that. I propose the following wording: That the leader of the party which who the general election becomes the president, no

qualifications. That is to accommodate the membership in the National Assembly. So we are saying that the leader of the party that wins the general elections shall become the president.

MR. RUKORO: I was also going to make a specific proposal. A part of it has been made by honourable Dr. Tjitendero, namely that the leader of the majority party automatically becomes the president of the republic. I was going to say that obviously that will take care of our first problem, namely the first president. I was going to add by way of amendment that in the event - that will apply to subsequent elections-there being no clear-cut majority party, that the person agreed to between or among a coalition of parties as the leader of the ruling coalition, automatically becomes the president of the republic. Thirdly, to add to his motivation why the president should not be part of the legislature, he referred to the separation of powers. I am not so much going to rely on that one; I was going to rely on the necessity to preserve the dignity of the office of head of state which he is concurrently holding with the office of head of government that therefore the president does not sit in parliament. And finally, that the president be- and is basically just an explanation or an understanding that should be reached -that the president at all times be accountable to parliament through his cabinet of ministers and in particular the prime minister. So that package will then replace 28(2) as we know it today.

MR. GURIRAB: I continue to plead for the election of the president of the Republic by popular vote I find that procedure to be most democratic. It takes us back to the origin of democracy. The examples that were cited about indirect election, i.e. as it occurs in the United States or in France or elsewhere are some examples where the president is elected directly by popular vote and wins or loses on that mode, without any indirect election.

MR. GURIRAB: I am disagreeing with it; I need to have time to elaborate. I also want support for my proposal. So, the concept of the president being either a member or not a member of the Assembly, if indeed we are.....to the decisions we took and accepted, i.e. the separation of powers, then it will be an executive president. The head of state to sit at the same time in the Assembly contradicts, negates that separation of powers and will not support that for the reasons mentioned. The president will, even in terms of the present draft, either directly or through the mechanism of the cabinet, the prime minister and individual ministers continue to be bound by this constitution to be accountable to the Assembly.

Mr. Mudge: The proposal made by honourable member Dr. Tjitendero – I think that is the same, it was just better formulated maybe by Rukoro – is very interesting. It is maybe a new idea, altogether a new concept. What I find interesting is that the president will now be elected more or less in the manner in which a prime minister is normally elected the leader of a majority party and he puts together his cabinet, he has executive powers. What is, of course, also true, then he will not be above politics, as a head of state in the real sense. But personally, under present circumstances, this might be the solution, and I cannot at this stage bind our party – it is not possible, because it is now altogether a new proposal, but it is at least something that we can very seriously consider.

CHAIRMAN: There was a private understanding to avoid taking matters up in the Assembly. But from my point of view that understanding is breaking down now and we must take matters to the Assembly and talk to the gallery. That is what we are waiting for, I thought. So it will be good that if there are disagreements, like honourable Mudge said, that we can put it down as a proposal not agreed to by everybody and take it to the Assembly.

PROF WIECHERS: Can I just point out one legal point. If you say the leader of the majority party or the leader of a coalition party becomes head of state or president, then you are adding a qualification for the head of stateship. It means, what if the next he deposed of as the leader of his party? Then you must tell us, does he lose his head state ship? Parties can do that. It is true, Pres de Klerk is the leader of his party, that is why he became president, but it is not virtue – that is a political fact- of his leadership that he is president, but by virtue of his election in an electoral college. So, if tomorrow Mr. de Klerk is not the head of the party; he won't be affected in his status as head of state. I just want to point out if you make a leadership party-political leadership the criterion, then you are complicating matters in the sense that that becomes a qualification and the day he isn't leader, are you going to say he loses head of state but he says on and there is another leader of the party.

CHAIRMAN: I have a proposal to make to the House. We cannot vote here I am told by the rules. When a chairman sees the House divided like this and there are material differences – and we

are back at that question – it is for us to bring these matters to the Assembly as a whole. We told our people that we have an agreement in principle. We don't have that. We have now seriously deliberated on things we have already agree upon, as we thought and we told the Assembly we have agree upon, as we thought and we told the Assembly we have agreed in principle. There seems to be material differences which cannot be resolved. So, the only way is to take it to the House where we disagree and vote and let the public know we are not agreed. The idea of this committee was to discuss everything and agree and once we came to the House there will be no discussion. But I see that there is a fundamental difference between the parties.

MR. MUDGE: When it is a fundamental difference. Between which parties do you see the fundamental difference?

CHAIRMAN: I see SWAPO's position as saying the president must be elected directly by the population and they seem to say that is the bottom-line, although Tjitendero, who is a member of SWAPO, said something else and two members came back immediately and opposed that, and went back to the minutes of the meeting that they never compromised on that point that he must be elected direct. I heard honourable Rukoro and Katjuongua saying that if the president, even the present one, is going to be elected by the National Assembly, that he has to be a member of that National Assembly, that he has to be a member of that again, they say as the head of state he must be above politics. There was also pointed out that he cannot be. So, seriously speaking, we will talk the whole week.

MR. MUDGE: On a point of order, I cannot agree with you, we have been talking for weeks now and to now, after only a few hours, say that there is a point of material dispute, we had more serious problems in the past; we succeeded in overcoming most of those problems. I was asking a very simple question this morning. I was not even saying that I am going to vote against the proposal, I wanted information. I wanted to know clearly whether we are now deciding or will be the first president or for the first five years, I wanted to know whether the president will be a member of the Assembly or not and I did not get an answer.

CHAIRMAN: When the answer was given by honourable Dr. Tjitendero that he is now providing a solution, honourable Mudge said it is a new proposal and he wants to take back for advice and so on.

MR. MUDGE: I thought that when proposals come from SWAPO's side that is a SWAPO – proposal.

CHAIRMAN: Yes, given that I am saying it was said we should take it out from here somewhere else and then we have to come back here again after we got advice.

MR. BARNES: No, I think you misunderstand. The proposal was made by Dr. Tjitendero. We said it is something that we might consider. These were the exact word of my colleague, "but it is a new proposal. " Immediately after that. So now we are waiting to find out where is the proposal that is opposed on this side, because we have specific ideas of support.

MRS. ITHANA: It is really very difficult. I agree with you that we have reached a deadlock. We must talk about it frankly.

MR. MUDGE: Between who and who?

MRS. ITHANA: SWAPO, on its part, has been trying to propose ways of getting out, but I must say that our colleagues on the other side are not forthcoming. We propose this, they have objection, we propose that, they are not satisfied. They are not committed. If they were committed to something then we could follow it up and try to get solutions.

CHAIRMAN: that is another problem really; when other members take the floor to talk you don't hear them. This is the problem, and it has been a continuous problem, with all due respect. When a member is talking you consult, so yes you don't follow.

MRS. ITHANA: It is frustrating. I don't want to believe the argument that SWAPO seems to be divided on the issue, it is not true. We have a proposal, our original proposal by Mr. Hamutenya. We had two proposals, the president to be elected by the population or the president of the majority party. This is the solution that we are grabbing with because our colleagues are not satisfied in any way.

MR. RUPPEL: I think we must realize that if we come to speak about material disputes it becomes very serious. I tried to understand and analyse the issues at stake and I find that what is beyond any dispute is that we have it in principle to have an executive president. I think there can be no doubt about that. What we have to talk about now, which has not been discussed with

sufficient clarity is how is the man be elected. That is the issue. I don't see that we have reached a deadlock. Where I have to agree partly with Mrs. Ithana is that we would like to hear some clarity formulated problems or queries or reservations from those who are against the proponents of a direct election of such an executive president. On the SWAPO-side we believe that it is a logical outflow of an executive president to be directly elected, and that he is then checked through various mechanisms provided for in the constitution. That is our principle point of departure and it has always been. Where are now standing is just the problem about how do we get him there and I think that is something where we must help each other to find a solution. I think Mr. Mudge this morning, in all fairness, before there was any ruling, asked what will be the consequences of a direct election with a view to the to the remaining provisions in the constitution which we have already discussed before, the checks and balances, what will it mean with the different mode of election now, from the indirect one by the parliament to a direct one? Would that have drastic effects on his powers vis-à-vis the other organs of state? Those were his questions. It was something which was, I thought, related to legal issues which our lawyers here could have answered. They could have told him the structure is not going to be drastically affected, or they could have told him then there are problems here and there, something like this and then we could have dealt with the issues. But as I understood it this morning there was no principle difference, we are now just getting bogged down in a lot of mud about how we get the president there, what it means to have direct elections. I am not agreeing that there is a breakdown; I don't see it like that and I think what we need is clarity so that we can deal with specific issues. There was a specific proposal this morning by Mr. Mudge to say "good, direct elections, what does it mean to the other issue?" That is where we stand and I think if the lawyers can tell us it is going to make a material difference, then it is not going to bog us down. On that point I would really move that we come back to that and ask the lawyers what the difference in mode in election, form the one provided now in subsection (2) to the one which we have proposed from the beginning, where there was this misunderstanding, the direct election, what that will mean. But it is for he lawyers to give us guidance in this regard. They are not going to decide any principles, but I think about clarifying issues, that is why we have them here.

DR. TJITENDERO: I just want to clear a very serious misunderstanding here; I am not making any contribution. Honourable Barnes said that there are two proposals from SWAPO. I want to say that there are no two proposals and in fact I went back to say that the sequence was misunderstood by honourable Gurirab and he nodded. I said I wanted to see- and it is the wording that changed, and I was addressing myself specifically to the impasse. SWAPO's submission from the beginning has been that we are advancing and submitting for a president who is directly elected by popular vote, on a one person, one vote basis. That notwithstanding, I thought we will come to that when we talk about subsequent elections. I said during the transitional period, because it is given, can we change the wording from the first president, that instead of saying first president, if that creates a problem of membership in the National Assembly, can we therefore say he shall be the person who is the leader of the majority party. That position has been clarified, that it is not only by virtue of leadership of the majority party that one becomes the leader, and I think I conceded to that, that there are additional qualifications which, of course, if the proposal was acceptable we would have gone into. So, there is only one SWAPO proposal and it should not be interpreted or deemed to say because on SWAPO-member is saying this, therefore we are stuck. No, far from that. We have submitted for the subsequent elections and I was trying to see whether we could find a way out f the transitional period.

MR. GURIRAB: A bit of plain talk. The elections we had in November last year clarified a number of things. One clarity is the composition of the present Constituent Assembly, the different majorities or, if you will, the representation of the political parties in the Assembly. As a result of that reality in the Constituent, Assembly it is very clear to my mind that SWAPO is the majority party. So, we are not discussing for the purposes of the present Constituent Assembly a theoretical matter. The leader of that Party is Sam Nujoma. I have no difficulty whatsoever to deduce from that, given the present realities in the Constituent Assembly, that the first president of the Republic of Namibia will be Comrade Sam Nujoma. Why am I saying that? I take it, talking to, distinguish-wise, members of the Constituent Assembly, as represented in the Standing Committee, joined now by distinguished lawyers, that the Constituent Assembly, as it is

constituted now will be converted into the National Assembly of Namibia. So, every time that I talk I don't want to be misunderstood that I am not talking about that. That is the given, the public know that. Equally it is so clear to me that Sam Nujoma's reality as the leader of the majority party will be ratified by the converted Constituent Assembly. So, in the sense he will be elected by the National Assembly. So that issue to me is solved. So when I am intervening, I am talking about post 435-elections. My only problem is about membership of Sam Nujoma in the converted National Assembly and consequently as a member of the National Assembly, and as was the case with the Federal Convention; the next person in line will become the leader of the majority party in the Assembly. So, I have no problem with that aspect. My intervention has to do with post 435 – elections. For that we would want the elections to be by popular vote, and with that I would then ask to consider the provisions for the president, as stipulated here, and weigh them against that position.

MR. KATJIOUNGUA: Mr. Chairman I think you were right that we are deadlocked, and maybe what you said is right, we should go to the Assembly and report that what we told them on the 20th was simply a dream, we are now encountering problems. I think that is the easiest way to do it, because the way we are interpreting facts here differ materially. As far as I am concerned, the election we had in terms of 435 was to elect an assembly to write a constitution – period. Then, if we are going to convert this Assembly in on anything else, it must be by understanding between the parties writing the constitution that we cannot have another election to convert this Assembly on the following understanding: I do not take it that the first person on the list of a political party automatically, because that party is the majority, becomes the President of Namibia and that should be seen that that person was directly elected. I cannot accept that, because it is just against the spirit of the whole Resolution 435 as I understand it, especially the 1982 Principles. So, I think if we can make a separate understanding as a transitional arrangement about the relationship between a president permanently in future elections it is a separate matter. As things stand right now either we accept the fact, as I see it, that the president elected by the Assembly will be a member of the Assembly, will sit in the Assembly and be accountable in the manner that we have pointed out here. If that is not acceptable to other people, then we are deadlocked, then I think we must go to the Assembly and clarify our positions.

MR. ANGULA: Yes, I have been listening very carefully and I have been reading the holy cow and I am proposing the following and I want you to listen very carefully: "The President of the Republic will be elected by universal and equal suffrage after every five years, save the first term of the president, who will be elected by the first National Assembly acting as an electoral college." This is in conformity with the holy cow and hope this will solve all your problems.

MR. STABY: I tend to agree with honourable member Ruppel that there is no deadlock, I think it is a perceived deadlock. I say so because we are mandated by the Assembly to submit a draft constitution to them. We are not mandated to submit to the Assembly acceptable to everybody, perhaps not unanimously, certainly without any votes against it. To me the question of the interim president for the first term of office, is fairly clear, how he is to be elected. It is also to my mind reasonably clear that he should be subjected to the checks and balances that are devised for the subsequent presidents or the subsequent terms of offices, because we don't want to amend our constitution unnecessarily.

To me the crux of the matter is whether there is any relationship between the elections of the president, his accountability to those who have elected him and to the organs of state and, incidentally, the methodology in which his accountability is brought about, what are the mechanisms. That to me is the crucial area, and I think also this is where perceived difference come about. I want to, by way of a direct question to our learned friends, ask to please enlighten us as to, first of all, what does the expression "by popular vote or by direct election" mean, and secondly, whether there is any relationship, direct or implied, between the way that a person is elected and his accountability, in other words whether the way of electing him does affect the checks and balances which are provided.

Let me just add one more remark to this. The record of presidents of independent with Bu... and ending with P W Botha, isn't one which I could describe as comforting, and I do agree that trust is something positive and good and it would be terrific if we could have trust in everybody that is elected to office. I say control is better, and therefore it is for me of prime importance to establish precisely not only how the president is elected, but also what the checks and balances

are. I am thinking in terms of, for instance the American President, powerful as he is, can be vetoed by one of the organs of the state.

MR ANGULA: I think there is total confusion and I don't know why this confusion reappears and reappears. The election of the president in this article 28 (2) does not negate anything that follows subsequently contained in this document. We are still going to work with those sections and subsections. I don't see how that election negates checks and balances. What is the confusion?

MR STABY: I am not saying it negates, I want to establish the relationship, because if I know that the way of electing the president has any effect on checks and balances, then obviously I know that in order to agree to how he is elected. If there are no complications we must weigh those and then we will be able to solve the problems afterwards very much quicker, if it clears the way.

So this body, the Constituent Assembly, has to pay attention to basically three factors when you have to devise your constitution in order to provide for those, and I want to call those three factors, the first one deals with the powers of the president. The second one I call the structure factor. Where is he placed within the constitutional system, what is his relationship to the other branches of government, and the third one is, how does that particular president get into the constitutional position, in other words, his election, his powers and his relationship with the other branches of government. In principle you must remember you are writing what they call a..., a clean state, you can give your own content to this thing. The moment you have decided the mechanism that we are going to use in order to identify or to put into that position of president a particular president, you have dealt with one issue. Now you proceed and you say this powers of that office, will be the following, and devising the powers of that office, you take into account not only what the powers of the office will be in terms of what the office might do, but you also take into account control over the exercise of power. That is the essence of democracy as the other part of the coin, the control over the exercise of power to prevent abuse of power. One mechanism you prevent abuse of power you have already agreed to, a bill of rights. Another mechanism preventing abuse of power is the principle of separation of powers and the concurrent element of checks and balances, and you can go on and even the political process, regular elections, they are also control of the abuse of power. Now your job is how to get the office manned, the powers to be exercised by that office and in devising the controls and checks and balances over the exercise of power, the relationship with the other branches of government come into play. That is, if he wants to pass a certain budget, an executive president, and he wants to pay his officials and keep the country running, it is for the parliament to approve that budget and to tie to it certain constraints if it wishes to do so. He has to appoint people. Vice versa he also has a function when it comes to the policy that parliament through legislation could decide upon and which his executive will have to implement. The courts have a very important role to play. In principle, to be more correct and specifically to the point, you have got a very great advantage in the sense that there are no real conventions and unwritten rules apply here. You can give your own content in devising the office, the control over the exercise of power and the relationship to the other branches of government. There is no, as far as the technique of devising a constitution is concerned, no direct result flowing from the one to the other. In theory we can say - in terms of democratic theory you elect an executive president, he should be outside, in terms of the true separation of powers, there must be separation of powers as far as possible. Those are theoretical things. There is no immediate law, 'n wet van Mede and Perse, that the moment you decide on this particular method to fill the office of the president, that the powers must be exercised in that way. To conclude with, Richard Nixon, when he abused his power in the Watergate Scandal, the very person that he had appointed as chief justice of that country had to decide on a legal argument by Richard Nixon that he was under no duty to submit his personal conversations, as recorded on tape-recordings, to a state public prosecutor, in other words an official part of administration, and the person who had to decide that issue was the very chief justice who was earlier appointed by Nixon and Nixon relied in his argument on executive privilege, in other words putting beyond control. He was overruled, he had to submit and you all know what the end of Richard Nixon was.

MR CHASKALSON: I would like to say I agree with what Mr Erasmus has said, and if I could very simply respond to the question raised by the honourable member Mr Staby, the question of accountability, in my opinion, has nothing whatever to do with the method of election of the president. The question of accountability has to do with the same provisions within the

constitution which require the president to be accountable in a particular way. That means that in my opinion you could have a president directly elected, who was under such constraints that he will be little more than a figure head and that all power would vest in parliament. Conversely you could have a president indirectly elected who will have such powers under the constitution that he would for practical purposes be what you refer to as a run-away president, and as my colleague Mr Erasmus says, the theory of what might be the better structure and what might be more appropriate has no application when you are when you are writing a constitution, because in theory, if you decide it is more logical to have A and more logical to have B, it doesn't hamper you if you are starting with a constitution. The powers and relationship between the different sections of the government will stem from the words you put down in your constitution, and there is no bar upon what you put down. That is my opinion; I don't know whether my colleagues agree with me.

PROF WIECHERS: In principle I have nothing to disagree with my colleagues, but there is a sort of technique in government if you have a directly elected the president or a parliamentary head of state. In the case of a directly elected president, where he is elected directly, whether through electoral colleges or by double ballots, so that he has at least the majority support of the population, you find, as in America - France has a bit of a mixed system - that he appoints his ministers in cabinet and they are not members of parliament. He is independent, executive with his ministers. But in order to check that, parliament has more powers on this independent man and his ministries. That is why in America you find that the President of the Senate, the Chairman of the House of Representatives and their subcommittees have extreme veto powers on president and his cabinet, because only he can appoint ministers and that has got to be approved by senate, but senate cannot appoint a minister or anybody. It has got to be appointed by the President of America. So, the point I want to make, there is in technique - and there are very good reasons - your independent, executive president, directly elected is far stronger in his executive capacity, but also stronger tied to the legislature. So, you can say the method of election does not affect the accountability measures, but in practice there are differences, and you must just make out, if you go for the direct system, then you are going to have these checks and balances, your ministers appointed will not be members of the legislature under a direct system, it could hamper the president, because his poor ministries are then under divided loyalties. They could say yes to the president, but then they have to say yes to majority groups in the legislature. So, you must have these practical implications in mind.

PROF ERASMUS: But it seems to be to your advantage that you can learn from what is happening in other system. So if you identify that certain things happen in other systems you do not want, you now have the opportunity and the advantage of history to directly address those issues in your constitution.

CHAIRMAN: The questions are now answered. Are you happy with the answers?

MR MUDGE: May I comment on this, please? Theoretically I agree. It is of course true that you can now decide on the method on which the president will be elected and then tomorrow we can discuss the powers and the checks and balances, but we must not forget, the people sitting around this table are not experts or constitutional lawyers, we are members of political parties who have been fighting each other until a month ago. We must take into account more than just rules or theories or academic solutions. We must take into account the realities of life, and I want to say that although I said just minutes ago - and I still insist - that we can come to an agreement, but I have no guarantee that if I agree on point one, that my colleagues will support me when it come to point two. I have no guarantee. I can say fine, it is true, we can decide what checks and balances there must be, but say for instance we agree now that the leader of the majority party becomes the president, then we have agreed. When we come to point two there might be a position where the one party wants to give more power to the president and the other party does not want to give more power to that president for political reasons. These are the realities and that is why when politicians discuss a constitution it is something completely different from professors discussing a constitution. It is something completely different. That is why I say we must discuss this thing as a package deal. We have to do it. I can't decide on point one without having the faintest idea what is going to happen when we get to point two and point three. Mr Chairman, I want to tell my colleagues from SWAPO, we are not that far apart. I want to be more honest and say, of course we are still battling with suspicion and we have all reason, because rumours are going around, which might be completely untrue, but there is no way we can prevent

that. Suspicions are being created by people, maybe deliberately. I have been in politics long enough to know that you cannot only rely on rules, you have to take into account that we live in this world, we have to deal with human beings, and first of all, when the president is elected by the people, you might find presidents who will say: "You government, you can go to hell with your constitution, I have been elected by the people, I have a mandate from the people and I am not going to bother about the constitution." You can get a situation like this, Sir. I wish I had time to read you some of the remarks made by people who made a study of presidentialism, what they said about that. I am sure you have read some of those books. Let us, for God's sake, discuss this problem in a spirit of goodwill; let us make all of us feel confident about the future. I don't see any problems and I want to say this, our party will not object to a president being elected directly if we are sure and confident that there will be no abuse of power. To use my colleague's words, we don't want to throw him out of office; we want to make provision in the constitution to build enough checks and balances. I want to suggest that the parties here go back and draft a chapter on the president and see if we cannot marry those chapters, and we could do it away and we come back tomorrow. On the other hand, you can now say we must go back to the Assembly to report, go back to the Assembly to say we have failed in our responsibility. No, Sir, I cannot do that.

MR HAMUTENYA: Mr Chairman, we can't read the minds of the people, what they will do tomorrow or the day thereafter, we can only draft a constitution which we hope will work. I think the advice given by the legal experts do provide grounds for us to move forward in terms of tackling the formulation of the constitution. Suspicion cannot be resolved here; it has nothing to do with what we are writing. If we are writing a constitution based on suspicion we will make no progress whatsoever. What is crucial is that I appeal that we proceed with article 28 with the proviso that wherever our colleague of the DTA would wish to refer back in this constitution to the power of the president and the relationship between legislature and the judiciary, even in relation to those clauses we have already agreed to, that they be allowed to refer back, as long as it only relates to the power of the president. I hope that we can go a long way to allay their fears. If we can allay their fears then I think we will progress, but can we please proceed with this article, go paragraph by paragraph as we have been doing and then, if there is cross-reference to things already agreed to which have to do with the powers of the president, we do so. If it is an acceptable proposition I think we can go somewhere, we can break the impasse where we are now stuck.

MR HAMUTENYA: If Mr Mudge agrees to my procedure that we discuss this and they will have the freedom to cross-refer to anything to do with the powers of the president, including those sections we have already covered, inasmuch as they refer to president, we will have the freedom to come back to them if that satisfies you we will see the president in relationship to all the other branches. If you agree to that I will appeal to the chairman that he allows us to proceed.

MR MUDGE: May I ask my first question?

MR HAMUTENYA: That one is part of the package. If you agree to my procedure, then you can do so.

MR BARNES: That one is part of the package. If you agree to my procedure, then you can do so.

MR BARNES: Let's discuss it from the beginning.

MR MUDGE: So, the interesting proposal then?

CHAIRMAN: Article 28, election of the president...

MR BARNES: No, the question is still....

CHAIRMAN: There is a proposal here now.

MR BARNES: The proposal was that we discuss the president in Toto, powers and what not.

CHAIRMAN: How do you do that? We have to start somewhere.

MR BARNES: We take them point by point from point 1.

CHAIRMAN: That is what I am trying to do. As honourable Hamutenya said, we can refer to other places, but he is saying only dealing with the specific issue being discussed. We are on elections now honourable Mudge is saying that provided they can go and check there is no objection to direct elections. So we now take that we agreed that the president will be elected directly.

MR BARNES: No.

MR MUDGE: We want a proposal now and continue. We need a definite proposal. Is Mr Angula's proposal on the table now or whose proposal? We need a proposal now.

MR ANGULA: My proposal strictly follows the spirit and letter, the chapter and the verse of the holy cow.

MR MUDGE: What is the holy cow?

MR RUPPEL: The 1982 Principles.

MR ANGULA: I am reading: "The President of the republic will be elected by universal and equal suffrage after every five years, save for the first term of the first president, who will be elected by the first National Assembly acting as an electoral college." Ration of powers are such that we can be satisfied that we can have control over the administration without sabotaging the operations of the government; I want to introduce a proposal. But one last point. The way I understand democracy of the 19th Centaury where it was compared to a military victory, the vanquished and the con-querer, but democracy based on the principle of the majority rights, that therefore we are all relevant in this process in various degrees, as a healthy democracy, to balance off things, to create a society, a system of government where we do not feel oppressed simply because we are minority, because the minority, because the minority, because the minority of today could possibility become the majority of tomorrow, and I don't think we want to put people in the position of revenging on the others tomorrow when they come to power. I want to regard the government of the day, even if I am the opposition, as my government or the government of Namibia. But then we create such a system. I am trying to say, I would be scared to go back, unless in total frustration, to the Assembly and say "we have failed." I have said, we have raised the expectations too high on the 20th, let's not disappoint the expectations of our people later. If we go tomorrow and say we failed – when we were together over lunchtime with my brother Hamutenya, the people I was sitting with were saying "for heaven's sake, the world is seeing you as a special case in resolving your internal contradictions." When you look at Angola, when you look at many African countries I also did know that a ... and ... whereas Muslims, if you die today, you must be buried the same day or tomorrow. I would not like to see things like that in this particular corner of our continent. So I am just trying to find out, as a matter of flexibility, whether we cannot ask our lawyers if we use the American model with maybe or two modifications, and see out of this discussion whether all these chapters relating to the executive and the legislature and the judiciary can be modelled along those lines with the modifications which are attentions are result of the debate Here, whether that cannot serve as a compromise, rather than discussing the president in the National Assembly or not, where he is going to be and that sort of thing. I am just thinking aloud, I am not making a proposal, just to find out whether something like that could not help us out of the deadlock.

MR GURIRAB: The American Constitution was written in the 18th Century and they found it quite effective in some very key aspects. That is why they added on to it some 27 amendments, some very fundamental amendments. Some people in America, academics, public, even some legislature tried to change this, that exercise of indirect election of the American president, the Electoral College. A number was done on the American people that make them feel that they elect their president which they do not, and we know the reasons why that is not popular election. I like the flexibility, I like Nahas Angula's attempt, I associate myself with it to be specific by way of a concrete proposal, but I like the idea of a mixed bag, the president being able to draw members of his cabinet from the legislature, but also to have the flexibility to bring in people from outside. We were reminded that we are dealing with, I got the opportunity to look at other constitutions, other experiences, but with that in mind, to do something that makes sense for our Namibia. We are also not writing a constitution merely for ourselves, imprisoned as we are by our own political interests, suspicions, the recent past. We say that when it comes to making commitments in terms of agreeing to formulations, then we relive the recent past. But if it is possible for us to think not only in terms of who will be the first president of the Republic of Namibia, but to think further down, what kind of constitution would make sense for our country, even after the president is no longer there, we should think about it that way. We went through this time and again, we made package deals. We identified three areas of material dispute, the presidency, the voting method and the configuration of houses, whether unicameral or bicameral, and we have gone a long way in the exercise of giving and take. For a moment I thought too that we are deadly deadlocked. I no longer feel that way listening to quite a number of interventions around the table, and also in particular listening to the views expressed by the learned gentlemen that we have brought to help us to crystallize our own thinking. I think we reached a point where

we are trying to attempt a formulation that would get us out of this and in that sense I associate myself with the attempt the attempt made honourable Angula.

MR ANGULA: Yes, I just wanted quickly to respond to the view of honourable Katjiuongua. I do recognize that Mr Katjiuongua has been making the whole of this morning some efforts to get us somewhere, and actually he missed an opportunity somewhere when he made a concrete proposal more or less along the lines I am making now. But we went on discussing and discussing. But what I want to respond to is the American model in the African context. When you are drawing up a constitution you should also see how possibly it can work. My fear with the American model is that it tends to distance the executive branch from other branches. It is too much distance. These guys just come to the congress when they are called to come and testify. I think that kind of distance in the American context is not healthy. You need members of cabinet with whom you can rub shoulders in the legislative body. You can even casually and informally ask them certain question or draw their attention to certain things. You meet them there; you need not make an appointment. Each day you rub shoulders with each other, you do whatever you want to do. If you create a cabinet of the president's men, these people are likely to put themselves somewhere in one building, everyone you want an appointment they are inaccessible. The possibility of that in this context is very high. However I think the best way to address all these concerns is really to go through this articles and sub articles and see what is missing, if anything, which needs to be improved to get consensus. That is the best way to go about it. So if we can go – and I am making a concrete proposal – and for the time-being suspend 28(2), go to 28(3) and go through the presidency, then we can come back and say we have decided on the checks and balances.

MR MUDGE: Just on a point of order, Mr Angula is now very helpful. What I wanted to ask, if we can accept that principle that the time we skip an article and go on, then I want to ask, if I invite applications for a position all I must decide what I expect from that person. In other words, I first have to determine his responsibilities and after I have done that, then I know exactly what sort of person I am looking for. Isn't it possible that we discuss functions and powers and duties of the state president and then we can discuss how we are going to appoint the president? If you think it is not acceptable I will not put up a fight for that, because I still have the right to come back and then we can go point by point. But I just suggested the possibility of taking about the responsibilities.

MR PRETORIOUS: Against the background of what Mr Erasmus has said here about pres Nixon, my question is: Can president be above the law?

MRS ITHANA: No ways.

MR PRETORIOUS: That is not what is happening in this article now.

PROF WIECHERS: What this really says, in his official capacity, he cannot be sued personally in civil proceedings. It doesn't mean to say that the state cannot be held liable for official acts, but not that the state cannot be held liable for official acts, but not the president. It is an immunity for him as persons.

DR TJIRIANGE: The wording itself confuses me. If you look at (1) and (3) (a) I think there is a contradiction there. I think the one says exactly the opposite of what is intended. (3)(a) Contradicts (1).

PROF WIECHERS: They are totally in conformity. (1) Says that the office of the president or the president, exercising official functions, can be sued and that is state liability, it is practice. If he is no longer president, just an ordinary human being, you can't then take him to court for official things, you will have to take his successor, and it also says while he is in official capacity you don't drag your head of state into suing him for R30 here or there, he is immune in that capacity, in his personal capacity, but not officially. You will always be able to take the president in his official capacity to court, as long as he is president.

Mr Angula: Can he sue somebody?

PROF ERASMUS: Yes.

MR BARNES: If he steals my car, can I sue him?

MR RUPPEL: If his wife wants to divorce him, she cannot sue him.

PROF WIECHERS: The way I have always explained this to my students is that it is not that there is not a ground of action against him, that remains, but he cannot be taken to court.

MR BARNES: But then he is above the law.

PROF WIECHERS: No, he is never above the law

PROF CHASKALSON: I think what you do is that if you have a president who does something like steals your car, you ask for him to be impeached and parliament will remove him from office. The remedy is that if a person does something which dishonourable, you remove the person from office and then the person ceases to have the presidential immunity which attaches whilst he holds office. Then the official capacity he no longer holds, somebody else holds the office of president and then will be sued in the official capacity for that. In other words, what it is saying is that parliament must deal, the president mustn't be dragged through the courts, if there are complaints about the president, start an impeachment procedure in parliament.

MR BARNES: The same with the criminal liability?

PROF WIECHERS: The same. If there is criminal liability the court of parliament will deal with it.

MR RUPPEL: I know its trivia, but is it assumed that the president never gets divorced? It is one thing if he steals cars, then therefore can be impeachment, but if his wife is perfectly happy with him anymore or falls in love with somebody else, she is tied to this man for the rest of his term.

CHAIRMAN: I have a question to ask in my capacity as chairman. We keep on saying that the African presidents don't want to quit office. It is true, because the lives they have as presidents are so attractive and good, besides the power. But if a president in Africa, who may not have an education and so on, had to leave the office, there is nothing attractive for him there. He is going to be dumped in his little village, no income. So, is it not better to also make leaving the office attractive, that you will have pension or something like that, so that I can say even if I leave I will be dignified still?

MEMBER: Parliament can do that.

MR RUPPEL: If there is a problem if parliament does it if is not in the constitution, to make the office secure for the time after he has gone. If it is not in the constitution the next government, if it is a hostile government, will obviously not pass such an act, It will say you go to your village and be a poor man forever, unless you have accumulated enough cows during your presidency. But that is one of the incentives for corruption. So I think it is a very sound idea to have some provision that he will be protected.

Adv Chaskalson: I think that that would be quite inappropriate. Apart from anything else, pensions are usually dealt with through acts of parliament, money changes its value from time to time, pensions have to be reviewed from time. To put into your constitution that your president shall be entitled to a particular pension, you will have to amend your constitution and there is something in dignified in that.

PROF WIECHERS: The South African Constitution is really not a good example for many things, but it has provision that it only says "by act of parliament shall by act or by law provided for the salary and the pension of parliament". Exactly for the reason which honourable Ruppel has stated. Then such a parliamentary act usually makes provision how it will be done in a more discreet way.

MR RUPPEL: Then parliament is forced to deal with it.

PROF WIECHERS: While we are there, this is one of the missing things as far as members of the cabinet and also members of the assembly are concerned. There must be provision for an act of parliament for parliamentary allowances.

MR MUDGE: We are all freedom fighters; we are not interested in money. Is that what you have been fighting for?

PROF WIECHERS: From our instructions there are basically two possibilities where one, the government that is the cabinet, then through the prime minister advises the president to dissolve. But as Mr Rukoro said, it comes from the Assembly itself. If there is a motion of no-confidence the prime minister advises him and says "we can't go on." Then there is another possibility which have been included in our instructions and which has been debated here. That is where it is a general impossibility to carry on. Say for instance a budget is rejected and then the president, in consultation, will decide that effective government cannot go on; we must have a new general election. So there are two grounds and that is how we are instructed. One, the advice through the cabinet to the prime minister, the other one is consultation, discretion of the president himself that things cannot work.

MR PRETOURIOS: Just to follow that up, can't we add "for major consultations?"

PROF WIECHERS: It was in the wording, but if government is unable to govern effectively, then it must be a major one. It flows from there.

MR KATJIONGUA: I want to ask the lawyers, if the president, not ceremonial one but the executive one in this case, is a product of the votes by parliament, accountable to parliament, where else does it derive the powers to dissolve that same parliament that it elected him without him moving anywhere else, moving out with the parliament? In addition to that question, where in the world as an example does this sort of thing happen? I have the French example in mind, but that is a separate thing, but in this way, if he is elected by parliament?

PROF WIECHERS: One should never forget, and this is why it has been emphasized over and over again, the president is elected by parliament but once he is in that office, he is vested with the powers of the constitution as head of the executive. He is not a creature of parliament, he is invested through a certain election process, but then he assumes the powers and functions and duties under the constitution. His checks and balances is then on the level of his cabinet following advice, consultation. But he is not tied to the apron strings all the time.

MR RUPPEL: He gets his powers from the constitution?

ADV WIECHERS: That is right.

ADV CHASKALSON: Can I add something to address the concern which I see implicit in some of these questions? If you will look at article 56, you will see that in effect the constitution may have to be changed, as formulated, in a different place, because when it was drafted it thought that the term of office of the president wouldn't necessarily be the same as the term of the office of parliament. That may have to be changed and that we can come back to. But what is contemplated by this constitution is that the parliament and the actually retain their function as such until the new elections have been held and so there can't be a power vacuum. In the same way as the president remains in office, the members of the Assembly can be summoned, that any time until the election, the day before the election, they will then be replaced. Since the president can't make laws himself, he can only deal with laws made by parliament. He can't do anything in that interim period. If he wants to change laws he has to summon parliament to do it and parliament is there to do it. So you don't have a vacuum and really what happens if you have bridging mechanisms, it is contemplated that parliament won't sit in that period, but if there is some need for parliament to sit, it will sit. If parliament needs anything, all that can be done in that period and then at the time of election there will be change-over a new parliament will come in to existence and now, as I understand the discussion probably also a new president will also come into existence and the constitution will have to be tailored to that.

MR KATJIONGUA: How do you dissolve parliament, members have gone home and then you summon them again to go on. Unless you explicitly say they are dissolved by the remaining office until Election Day?

ADV CHAVSKLASON: That is what article 56 says.

MR KATJIONGUA: No, to summon means you get them from somewhere else where they are in the meantime.

DR TJIRIANGE: Can we not, for the sake of clarity, put those things that honourable Rukoro says, the grounds, in this document. You said two grounds only. Why not put them in there so that these are the only circumstances?

ADV. WIECHERS: They are there, if the honourable would look at article 31(2) (a). Article 31(2) (a) is the government is unable to govern effectively, that general discretion with his cabinet. Then 55(1) is then the second ground, the advice of the prime minister.

DR TJIRIANGE: You say only two grounds and I don't see any of them mentioned here.

ADV WIECHERS: But there could be even more grounds. These are the two criteria.

MR KATJIONGUA: And the vote of no confidence, do you have...

PROF WIECHERS: If the prime minister and his cabinet are appointed by the president, they are the president's men. When will they go up to the president and say "please dissolve the National Assembly?" It would be all those cases where they can see, the cabinet that they don't have the support of the majority in parliament, because they can't initiate legislation, they can't carry on governing. So, they will go to the president and say "we don't have the support of parliament, please dissolve, let's have a new election" and those could be various instances, rejection of an important vote, rejection of foreign policy, rejection by the house of a budget or formal motion of

non-confidence. There could be many, many things to make the cabinet and the prime minister assured of the fact that we cannot rely on support in the house.

MR BARNES: The honourable learned gentleman is stating the explanation from a legal, professional point of view. We are thinking as politicians with cognizance of the past, the present and what can be in future. It is my submission that is wide open; it does leave grounds for abuse, because especially if the election is proportional representation on party list, your own president might want to get rid of the members that are there, he has other members on the new list for a new election. These are all possible abuses and this is why in view of the fact that nothing is...

PROF WIECHERS: This is what stands here. Parliament is dissolved, but it could be very necessary to get that parliament in that 90 days after dissolution there must be a general election. It could be very important. Say for instance you have a president that says "I am dissolved parliament, I am calling out a state of emergency because there is no parliament" and then the constitution says it has to be ratified, this state of emergency. Then he must call parliament back, even after dissolution, or a budget or any important matter.

DR TJIRIANGE: But the procedure of electing members to parliament is slightly different, it is not actually vested with the president. Once the parliament has been dissolved it has been dissolved until such a time that the procedure is followed. There must obviously be a provision which Prof Wiechers: we are coming to the question of how the president is elected, and if he is elected directly by the population and take for instance that proposition that has been a proposal, that he is elected at the same time as the National Assembly and he feels now is the time to invade Walvis Bay, the island, and my popularity is very high with the population, I am going to dissolve, I am going to be elected with a huge majority and my party is also going to get a two-thirds majority in parliament, now is the right time, how do you write such a thing which is political expediency? Mrs. Thatcher does it; Pres de Klerk does it, anybody at a given point in time calls for a general election to strengthen their support, that it is reflected. Can you prohibit that kind of dissolution for political expediency, and can you or do you want or may you prohibit that kind of political manoeuvres in your constitution?

Mr MUDGE: I think what pro Wiechers said right now, if I remember exactly what we wanted to prevent. Rightly or wrongly, but I think was the argument. We did not want the president to dissolve the government for any other reasons than those of time or when the country becomes ungovernable. The problem that we have, I am not concerned with article 55 because you must always read the two articles together and it is a fact that he can only do it if the government is unable to govern effectively. I remember the honourable member Mr Rukoro made a suggestion there that we should put that more clearly and not only say "become ungovernable", but it should be because of a major constitution crisis. How do you in any case define a major constitutional crisis? I think it is a practical problem. The question I want to ask, what is a government? You know, you can have a problem because the cabinet cannot function properly and there might be nothing wrong with the Assembly. In that case I suppose the Assembly can move a motion of no confidence in the cabinet, am I right? I think we have that provision. Why should we allow any president to just dissolve a government just because he wants an election? And if we must then in the case of a major constitutional crisis, then we must make sure that we can define that problem. I am not sure we can. A last point. What happens to the president in case of the government being dissolved? If he also must go it is another check that he wouldn't do it easily. But can we discuss that point now or must we discuss it when we come back to the point, the election of the president? I think that is about the only provision that we can make for power not being abused.

MR MUDGE: May I ask, what about the possibility of the cabinet and the president resigning if they want to force an election? I think provision is made for that in some constitution.

PROF WEICHER: It doesn't work like that. The cabinet can go to the president and advise him to dissolve and he says "no, I don't want to dissolve, you must do better business" and they can then resign and he appoint another cabinet. If that cabinet is not working, "nou het ek moeileikheid", now I have to dissolve.

MR MUDGE: I think after having listened to all the arguments, in my personal opinion there is not much we do about this. The only possibility is if we make it sort of compulsory that if the president dissolves government, he must go himself. He cannot get rid of the government and stay in power himself. I think if we do that we can forget about the rest.

MRS ITHANA: Is the member referring to parliament or government?

MR RUKORO: As a matter of constitutional theory my understanding was that the moment the president says "I hereby dissolve parliament", that in theory the parliament is dissolved and in theory his own office is dissolved, but that is reality the president continues to be the president for the next 90 days and that also in reality, similarly, the members of the Assembly remain competent. They were competent, they remain competent until the next election, and in the same manner, and in all other respects as if the dissolution has never occurred. In other words, we are dealing with constitutional theory in terms of the declaration of dissolution, but that for practical purposes....

PROF WEICHERS: If it is dissolved, yes, in 90 days there is a general election. So it has very strong consequences. It is just bridging for business.

MR BARNES: I submit that the argument of the honourable Mr Rukoro would have been very logic if the president was elected by the Assembly, as a member of the assembly, then the consequences would have followed to its logical consequences that if parliament is dissolved, he is dissolved because he is there by virtue of parliament. Our problem lies in the concept or the suggestion of a president elected by the people and not sufficient checks and balances to control this possible unguided missile.

MR BARNES: The people's president, viva. This is where our problem lies. What further complicates the matter and I appeal for your indulgence – is the mere fact that we are dealing with two different issues here. We are dealing with an issue where we want to use the democratic process to bring something that is not completely democratic by avoiding an election. It can be argued that the 1982 Principles does provide for that, but the electorate out there was under the explicit impression that they are voting for a constituent assembly that will draft a constitution. With these two things in mind I further submit that the conflict situation that we will have to resolve is to draft a constitution for an interim arrangement with a final solution to an independent state.

MR HAMUTENYA: On a point of order. I think Mr Barnes is now out of order. He is now taking to other issues. What he has just said definitely is out of order. We are drafting the permanent constitution of Namibia.

ADV WEICHERS: Just to elucidate. It is true, in direct presidential systems the president, being elected on his own, has no power of dissolution. You will never find a directly elected president dissolving the National Assembly. Then he can't touch it.

MR BARNES: I was out of order and I should be afforded the opportunity to prove that I was not out of order. That is democratic. The mere fact that I referred to a particular thing was under the assumption that you said cross reference we might be made and I assure you, that is what you have said. If I have then acted in good faith on the arrangement of ruling that you made, I was not out of order.

CHAIRMAN: In good faith, you are out of order; because you are bringing something in we have already agreed upon.

MR BARNES: To come to the point, the fact that this clause is extremely wide open we have another problem with this type of clause. It cannot be wished away that the president will also be the leader of the majority party, he will also by virtue of that power elect or nominate his own cabinet. There are those normal checks and balances that if we did follow the democratic process as prescribed by the 1982 Principles, we would have had a different situation here. It the idea of turning the constitution would have been much easier, because we would have then drafted a constitution...

CHAIRMAN: We're now on a hypothetical question, "if we agreed to deal with articles here. It will be a ruling now, we are dealing with articles, not "if" situations.

MR BARNES: I withdraw the word "if" and I am not finished. Unless we can clearly identify under the circumstances can the prime minister with the majority of the cabinet recommend to the president that he must dissolve, this matter leaves a lot of questions, because it does not provide sufficient mechanism to prevent abuse. I thank you.

MR HAMUTENYA: Mr Chairman, I wanted to say earlier on, before we got some directions, exactly what honourable Rukoro has said, that as far as I am concerned, article (2)(a) is only valid in the context of the original draft we are thinking about, the way to bring about the president. If he is going to be directly elected, I don't see how he can dissolve the parliament, because here now we are talking about strictly the separation of powers. That was my point.

Actually, if I had been allowed to talk then maybe we could have solved most of the problems. If indeed we accept the new proposition for a directly elected president, then he cannot have the power to dissolve parliament.

MR MUDGE: Isn't that the answer?

MR ANGULA: I would like to ask the members to read this in conjunction with the rest of the constitution. I think article 31(2) (a) actually refers to article 62 on page 48. There it is where I can see the National Assembly making it impossible for the government to function. If they refuse to approve the budget, if they refuse to provide revenue and taxation, it makes it impossible to rule. The source is still the National assembly. Article 55(1) should be read in connection with article 28(6), that the prime minister and the members of cabinet can decide that the president is being impeached by the Assembly, and they are to advise him that "boss, you are in a bad shape because you have been impeached, therefore it is better for you to dissolve." So, it is only under these kinds of powers I can see the president can dissolve the National Assembly. If the drafters of these articles can refer to these other articles for cross-reference...

MR HAMUTENYA: If you are taking it from the American example, no American president can dissolve congress, so I am saying it is not applicable.

MR RUPPEL: I would agree as a matter of theory with the honourable Mr Hamutenya about the strict separation of powers, but for the reasons raised by Mr Angula I think there is merits in considering it and if we consider it to have a president with such powers, I think one must consider that there is not only the courts to keep a check on any unauthorized actions, which Prof Erasmus was referring to, but there is also, if he goes on a tangent of his own without strictly complying with the fact that he must act on the on the majority of the cabinet and the prime minister, there is a review provision in subsection (7) of the same section we are dealing with, a review of action. I think having said this one should make specific provisions that for the purpose of conducting that kind of business as review function of legislation, dissolution should not affect the operation of the parliament. That is now if you refer to article 56(a), where it says that the members shall remain component to perform the function of a member I think that should perhaps specifically provide for the purpose of review. That would constitute an effective control as well on the president who goes too far and who does not comply fully with all requirements. So, I think there are all these checks and they look to me to be very real.

MR MUDGE: Can I make a proposal? I have listened to all the members and I think the only thing that I want to ask be accepted, is that the lawyers look at the possibility that the president, whenever he dissolves the government, he will also have to be re-elected. I think that is about as far as we can go, Is it the case or is there a possibility?

CHAIRMAN: The lawyers can look at that. It was in the former SWAPO-constitution. Agreed. Sub articles (2) (b).

MR ANGULA: Are we agreed on (2) (a) that the lawyers will cross-reference some of these things?

MR KATJIOUNGUA: These appointments will be made by the president, but I think they must be subject to parliament. They are very life of the stability of a nation. i.e. (cc), (dd) and (ee). That is my view.

MR RUPPEL: I think as a matter of principle one should really not use parliament to okay every executive action which is necessary in the running of the country. It is really overburdening the functions of parliament. I think there are certain things which must be done by the president. He appoints, but he must not every time run back to the legislature. There is a separation of functions. The legislature has one kind of function, namely that is elected to make laws. That is its principle function and we must not use that body for all sorts of other work if it is really not essential. So I strongly move that this appointment is a clear appointment and not subject to any other person's approval. If somebody is desperately unhappy with it, they can always review that decision.

MRS ITHANA: I want to say exactly what he said and in addition I would like to give a warning that if we are subjecting every appointment to the approval of the National Assembly, we may scare some of the people who would do a better job if they are given that opportunity, if we will subject their lives to be discussed in parliament.

MR GURIRAB: I think honourable Ithana got my point. I hope that we will not be selecting and appointing criminals for any position in the state organs, but we want to ensure that the president

of the Republic of Namibia does not appear on the paper as a paper-tiger, a puppet president of parliament. We don't want to send such a message across the land or abroad for that matter. He will be a democratically president, popularly elected – I hope that what we will agree – and we should give him such flexibility and authority within the boundaries of this constitution to carry out his responsibilities for the life of his office and therefore every bit of appointment does not really have to be approved by parliament. We are not dealing with a person who installed himself, declared himself emperor. We have already gone a long way in emasculating the powers of the executive president. I think at some point we should be conscious about the kind of executive president that we would like to have as head of our state.

MR KATJIOUNGUA: First of all I don't think goodwill alone is enough. They say the road to hell was paved with good intentions. So, number two, in a number of countries, US included, the chief of the joint chiefs are confirmed by the Senate and this is done in some other countries as well. So, that is also an opportunity to find out that the president is not employing criminals – and I don't want to use the word, but it was used by my colleague here- and also for the people of Namibia to establish that he is not doing that. Anyway, I want you to note that if the feeling of the House is that they should not, then differ with you, because I cannot agree to things here which I cannot explain outside to my people.

MR HAMUTENYA: On the first (aa), it is the kind of thing we are talking about, to appoint on the recommendation of the Judicial Service Commission and with the approval of The National Assembly the Chief Justice. Is it really to be on the recommendation of the Judicial Service Commission?

DR TJIRIANGE: There is a problem there, because it is said that the Chief Justice is the chairman of the Judicial Service Commission. How can his own Commission recommend him?

MR KATJIOUNGUA: No, I think the president should appoint all these people, but I will retain my position "subject to parliament approval." I want to register that.

DR TJIRIANGE: I also have a problem. Some of the positions here can and cannot. For instance, the judges, I don't think there is a need for the judges to be confirmed by the Assembly. No respectable person would like to come and be discussed in the Assembly, where you went to school, will you be a suitable judge or something like that.

MR RUKORO: This question relates very seriously to the whole question of the independence of the judiciary who, in my opinion, really are the final defenders of this constitution. We can say that the president must protect the constitution, but in the final analysis it is the courts of law who are going to come in and say: "Mr President, you are going too far." That is why I feel that apart from the approval by the National Assembly, which is subject to the changing majorities, you need an independent body of provision with integrity to in the first place recommend, (a) both in terms of appointments and (b), in terms of dismissals and for the Assembly to debate these matters subsequently. But to leave them simply to political complexion of this House. I don't think that is too reassuring in terms of the independence of the judiciary in the long term. This is even reinforced if we take into consideration that we have agreed that the first appointees are only for the first five years. So, if you read these together, then I think we cannot really remove the necessity for some kind of professional body to make a recommendation to the president who will then appoint, subject to confirmation by the legislature.

MR MUDGE: The point I want to raise, and I want to appeal to my colleagues, I am not opposing Mr Katjuongua, I fully support the principle that the president must not be free to arbitrarily appoint people, but on the other hand I also support the view that it is not for a legislative body to discuss appointments. I am not very happy with that. The alternative is that we make sure – and think this also in line with what our learned friend said right now – that the Judicial Service Commission and the public Service Commission must be appointed in a very, very responsible manner. Those must not be lackeys of politicians; they must be professional people as far as possible. I reserve the right, when we come to the appointment of the Judicial Service Commission and the Public Commission also for the interim period, that we make sure that we have the right people there. Then the appointment by the president will in fact be a formality. I think this was always the case. I don't think presidents normally appoint people without having been assisted by professional committees and bodies, unless they want to make it a political appointment. I want to speak frankly about it, some of these appointments have already been

announced, and we don't even have a Public Service Commission or a judicial Service Commission at this stage.

MR RUPPEL: I agree with the suggestion made by honourable Mr Mudge, but I think as a compromise one could perhaps say – if there is a strong feeling for having some sanction from the legislature for these offices – that appointments can be made and ratified but without debate. There can be informal discussions or in terms of the rules of the House some discussions, but not in the public and if the House feels this is not a good appointment, they vote him out with 51%, with a simple majority. If one looks at the dignity of the offices of a chief justice and he is appointed by somebody and the other party votes against it, he goes into office with a simple majority behind him, it is not a good start. A chief justice should have more clout and similar considerations apply to the other appointees like the ombudsman. The Attorney General I quite honestly don't know, because in the Commonwealth-system it is not quite clear whether that is a political appointment or what exactly the status is. There are some problems there with the Attorney General. There I must look at the lawyers.

MR ANGULA: The reason why some of us are saying that some of these appointments, like chief Justice, should be done by the president directly is precisely to protect the integrity of the person. Once you do it through parliament I am inclined to ask for the CV and I am also inclined to make my private research. If what you found in private doesn't stand in the CV I will be inclined to ask questions and that in public. Then you are coming up with all sorts of difficulties for this important official. I think the idea is really to protect the integrity of that person; it is not really to hide anything. That is my point of view. But of course the Judicial Service Commission has to be involved; perhaps the president is entitled to also seek views from whomever he wants and that kind of thing. But once you subject it to parliamentary hearing, for sure you can prevent members from asking questions. That is the whole problem.

MR GURIRAB: I want to add another consideration. We are perfectly entitled to be idealistic about our society and to try to inspire our own constitution-making with a certain degree of idealism, but something are happening in some developed countries where very competent people are now shying away from public offices, because of some standards that have been set and we do not want to be so ... in our insistence on the need for parliamentary ratification of these appointments and thereby frighten away people who are otherwise very competent for some personal reasons might not want to be subjected to scrutiny.

MR BARNES: I just want to cite a very, very recent example. Very recently the president of the United States wanted to appoint a certain secretary. If that secretary didn't appear before the senate Committee, and despite the findings of the Senate Committee this man was absolutely – I could use the word corrupt, He was an alcoholic, he was a womanizer, but the president of the United States insisted on appointing Brown and the Senate Committee turned it down. This saved the people of the United States a lot of embarrassment. The idea that a person would feel that he is being scrutinized, If he has nothing to hide then he has nothing to hide and then – without due respect to honourable Ruppel, defending a position of appointment in here – that also grants a reason that there is a need for parliament to approve or ratify.

MR BIWA: Honourable R Barnes touched on the point I wanted to touch. I would just like to add that there is a need that public officials meet the requirements and demands put by the public. Therefore there is a need for certain appointments, especially the high ones, to be confirmed by parliament. If we have reservations about allowing these people to appear in parliament and to answer questions, I will suggest that we give this task of confirming this person this person to a subcommittee to conduct some kind of confirmation.

MR RUKORO: I feel that we have the categories right, but it is a question of who must be a subjected to some kind of ratification or confirmation process and who shouldn't. In my own opinion, I think, just to use a broad criterion, all political appointments and all quasi-political appointments can maybe left to the president to appoint. But when we are dealing with some professional categories, like judges and like the Auditor General, there I feel in addition to the presidential appointment, there should be some other steps as well, including recommendation from a professional body, including ratification by the legislature. Based on what I said, for instance I see that under 3(a), specifically (bb) we have the Attorney general. If the Attorney General is going to be a political animal of one kind or another, then I don't see why should be here, if he is going to be a member of Cabinet for instance. I don't think we need to subject to him

to some kind of ratification. There I think it is a straightforward political appointment by the president. The same thing applies to ambassadors. I don't think really at this stage of our development that we want to say ambassadors, who are by necessary definition political appointees just like ministers, should be subject to confirmation or approval by the legislature. I think we will reach the time when we have too many qualified people and therefore there are a wide range qualified people to choose from, like in America, that we can start saying, "wait a minute, because of possible corruption, maybe we need some kind of confirmation here." Therefore, based on what I am saying, I feel that when we talk of the Judicial Service Commission, then I think all judges, including the chief justice – there I am clear in my own mind – to buttress the independence of the judiciary, which in the ultimate analysis must be the final defenders of the constitution, that the position must remain as it is there. The same thing with the ombudsman by virtue of his position. The Attorney General can get out of the list of people to be approved, that is if he is going to be some kind of political animal or a cabinet person. If he is going to remain what he is today, then I think the question for approval comes in. So, it is a question of what we want.

Finally, the Director General, I see, must be appointed on the recommendation of the Public Service Commission and approved of the National Assembly. My understanding of the Director General of Planning is that it is a political somebody who has some kind of cabinet status, and just like ambassadors I don't see why this person should be approved. He is almost like the person advisor to the cabinet on economic matters. Do we really need a parliament and the Public Service Commission to ratify these people? I would think we take those three people out – ambassadors, Attorney General and Director General.

MR BARNES: This is the danger of the situation here. The situation here is that if the Attorney General is a senior member in a political party and he is appointed by that political party into a position where he is supposed to be absolutely neutral, professional in his actions. This is the question that arises in our mind. It is continuously said, political appointments. I would like to ask this question with due respect: Is the Attorney General, the Ombudsman, the Auditor General, the Governor general, the Director of planning, are they part of the institutions administration or are they political figures, because the minute we politicize our departments and heads of departments, then we are heading for trouble, because obviously the person in that position will always know "I am only Justice, the judge President, the President of the Constitutional Court, are they political appointments? Because if they are political appointments, I can assume you we are in deep trouble.

CAHIRMAN: I would have thought that they get competence from the parliament to do certain things as delegated members of the parliament. We must be careful, they were delegated authority too. So, if they are going to appear before parliament and be appointed, how can parliament sit and appoint people?

ADV CHASKALSON: That means under (b) you want us to appoint on recommendation the Public Service Commission but nothing else.

MR MUDGE: When it comes to political appoints, take the present position. SWAPO is in the majority in the National Assembly. They have caucus-meeting with their president; their president decides to appoint A as Auditor General. Then it goes to the Assembly, the Assembly will support it, the majority party will support the president, but if the Judicial Service Commission and the Public Service Commission is appointed in a proper manner and discussed in parliament so that the president will not appoint people in those bodies which are political lackeys, then I think we will all feel more comfortable. Whether they should also be individually discussed in parliament, I don't know what you have decided there.

DR TJIRIANGE: I do understand the sentiments of the previous two speakers, but the question was asked: If you make the Public Service Commission subject to this approval of the Assembly, it means it has been given the mandate to appoint those people that they are supposed to appoint. Now whilst they appoint them, why should the people that have been given the mandate to appoint, go back again to the Assembly again for approval? That makes it twice. They have delegated powers to appoint. Once they have been appointed by Assembly, then they are carrying out the job which we have appointed them. Whoever they appoint is on the delegation of powers from the Assembly.

MR RUKORO: My point is, the final appointment cannot be made by the professional body itself. The final appointment must be by the executive, but on recommendation of that professional body. So, that being the case, once the Public Service Commission or the Judicial Services Commission was itself approved by parliament – as we are about to agree – then in that case the second approval by the National Assembly falls away.

MR RUKORO: I was going to make the same point, that point (a) on 33, the two-thirds be changed to 52%, an ordinary majority and point (b) be deleted as meaningless, on page 33.

My last point on point (7) is also on page 32 where it says “in terms of this article”. I want this to be “in terms of this constitution.”

MR ANGULA: I think we have to be consistent. We cannot have certain decision affecting the president determined by two-thirds and others by? We must be consistent in the constitution if we truly want checks and balances. Either all of them will be determined by 51% or all of them will be determined by two-thirds.

MR RUKORO: I think we should see these things in the right perspective, Firstly; could honourable Angula give us one or two examples of where, in terms of the relationship between president and legislature, we are demanding that it should be resolved by a two-thirds majority? And Secondly, my understanding of this thing is that inasmuch as we are saying we don't have a crazy president who is going to kill babies and stuff like that, I don't think we have an irresponsible legislature which is going to say that simply because they would have come to a different conclusion, by that reason of that alone, every presidential action must be up for review. It is not possible that every action of the president is reviewed. This simply a fall-back position whereby we don't have to require positively the approval, confirmation or ratification of executive actions by the president. That is why we are saying, inasmuch as we are not going to say every action of the president must be ratified, we are saying there should be a mechanism in rare case in the exceptional case whereby it is a sufficiently serious question. The Assembly can have a way of asking what the policy considerations behind this particular action are. If the case can be made out that the president acted in good faith, correctly and so on, that is the end of the review. If, on the other hand, it becomes clear that maybe the president acted without sufficient thought on some questions that is where the review functions come in. And I think the question of a simple majority is a healthy requirement.

MR ANGULA: We must understand the constitution as it is saying. What this paragraph is saying, once you review, reverse and correct an action of the president, you are actually expressing a vote of no confidence. That is what you are doing.

MRS ITHANA: Yes, I wanted to say exactly that. This is a very embarrassing situation whereby an action taken by the president is being discussed in public and a vote is taken by a simple majority. It is embarrassing to the state and to a person as such and therefore the requirement must be high. He must do something really serious.

MR RUKORO: Generally in any system a vote of confidence, is it not resolved a simple majority?

MR MUDGE: A vote of confidence is normally a vote by majority, not a two-thirds majority.

MR RUKORO: That is the point that I wanted to make. The second point is, does it mean that on each and every occasion that the government does not get its way in the Assembly, the government must fall? Yes or no?

MR ANGULA: Yes, once you corrected and reversed it is up to the president. The president will say there is something terribly wrong.

PROF ERASMUS: I would just like to add one two things in order to point out the seriousness of this decision. A vote of no confidence under the Westminster-tradition results in dissolution of the government. That is the one thing you have to keep in mind in determining for yourselves the effect of what you want to achieve here. I think you must also take in to account the two desires: One, that you want to control the exercise of powers of the president, but on the other hand, you said earlier there must be separation of powers. If it must be separation of powers and it seems to me there must be some sort of area where the executive has primary functions and responsibility in some area where the legislature has the same functions, you have to balance these two things, separation of powers and checks and balances and in the end-result you must have effective government. The seriousness of the type of control must be taken into account.

MR MUDGE: I think Mr Katjuongua was not very happy when I did not come out strongly in favour of his proposal that certain appointments must be a ratified by parliament. That would have

been with a simple a majority. I was of the opinion, let the president make the appointments, let the president take the decisions instead of asking parliament to do that and discussing everyone of those appointments or decisions in parliament. But then, on the other hand, I thought as a sort of remedy, let the parliament then have the right to reverse some of those decisions if they really feel strongly about it. I don't think that should always be seen as a motion of no confidence. I don't think so. If you feel that must not be all decisions, let us then specify certain decisions. If you say it must be done by a two-thirds majority, then in case you give that right to parliament to reverse a decision. Then it affects the principle of division of powers in any case. All I am asking, let us decided that it should be at least 51%. I think it will seldom happened that all the members – the opposition will in any case never have 51%, so it can only happen with the support of the ruling party and a substantial number of the ruling party. But I just wanted to make it clear that instead of expecting government to approve, give them the right to reverse.

MR HAMUTENYA: If we accept the proposition of a president being elected on his own merit, it is quite possible that he may be the leader of a very small minority. If Mr Katjiuongua has only two people in parliament but individually he is a person who is popular, he could indeed win the election. So therefore, if he was in the position where half of the Assembly come together and override his decision, it would be a mess. So, to protect that situation we should at least agree to a two-thirds majority. Let's not look at the strength in the parliament, it is not relevant.

MR MUDGE: IF you would allow the president to be elected by the Assembly and to be sitting in the Assembly where we can criticize him for what he is going, it changes the situation. This is one of the arguments that I can use convincing my people that the president can be elected directly. That will be the only control we have him. If he is in parliament we can criticize him and he will have to reply.

MR ANGULA: I wanted to answer first to the very relevant queries by Mr Barnes. Presidents are human beings. Human beings are fallible and it is precisely for that reason that we can provide mechanisms of impeachment and the very things we are talking about here of reviewing, reversing and correcting. Nobody questions that there is a need for review, correcting, but what we are saying, in making a decision about that, because you are going to constitute yourself in a kind of a court, that if you take a decision should really carry the weight of the House and that is why we are saying that decision requires a two-thirds. Any self respecting president, once you do that, will certainly resign. We are talking about appointments; we are talking about any action and precisely because you are likely to make mistakes. Any mistake you make, the parliament constitutes itself into a court, decide by simple majority and throw you out. You will have governments falling day in and day out, unless you ensure that every government that comes into power must have more than 51% of the votes, otherwise you are going to be in trouble. That is the reality.

MRS ITHANA: We have tried to build in control mechanisms in this constitution. Firstly we said the president must do whatever he does in consultation with the cabinet. So, whatever he has gone through the cabinet and the cabinet did not realize that he is making a mistake, until this matter is taken to the...

MRS ITHANA: I was saying there are enough control mechanism in this constitution and if all the control mechanisms that we have put here are capable to see the serious issue that the president is committing, then it is something that is a minute, other than to be taken to the parliament and even a decision to be to reverse. As I said before – Comrade Angula has put it in the right language – this really embarrassing and if we are deciding to embarrass our president, then we must really pay the cost and you're not embarrassing only one person, you are embarrassing the cabinet with which he is working. You are in fact embarrassing the whole nation. It must be taken by a two-thirds majority.

MR HAMUTENYA: If he wrong he must be embarrassed.

MRS ITHANA: If he is wrong he must be embarrassed, but then he must understand that he has caused his nation an embarrassment. I say a two-thirds majority.

MR TJIRIANGE: Yes, regard this as a serious erosion of the president. Once you have this will make the man completely impotent. So, I would really like the whole provision to be scrapped.

MR ANGULA: Yes, honourable Ruppel has said very correctly that the function of the legislature is to make laws. However, I would also like to add another function which is important and which is reflected in this Part 2. I think what is supposed to be achieved is that the legislature, in relation

to the presidency, is also to be seen as a moral voice a way. It can express a moral view about the behaviour and the actions of the president. By the mere fact of reviewing the decisions of the president, you are making a statement about the competence and other things of the president. You are a judgment about the president and you should send a message to the president by that method. When you are taking a decision, the parliament is now acting as a correcting mechanism and that particular correction measure at least should be carried by a reasonable number or by a large composition of parliament if it is going to be meaningful. Otherwise the review and the correction, as it stands, can be abused by people. With due respect to the position of honourable Katjiuongua that he does not think anybody will use this thing, but actually it can happen. So if we are going to perform that corrective function, then you must do it in such a way that the decision was taken truly and really by the overwhelming majority of parliament. Otherwise you are creating confrontation and suspicion in the country, because once the parliament... itself that way, the nation will also take sides, the people outside. If you are not careful and take a decision by simple majority, you will find that the people who support the president will march and denounce parliament. So you are creating confrontation. But if it is taken by the overwhelming majority of the people, the people will think he is up to something. I want us to separate these three things: Parliament is a legislative body with a separate function. It has a moral expression on behalf of the nation to control the presidency and a correcting mechanism and that provided for in the impeachment article. So honourable members, as much as we as we want to control the run-away, I think we should really control it in a responsible manner.